SUPREME COURT, U.S.
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No. 09-628

In The
Supreme Court of the United States

RICHARD VEZINA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

PETITION FOR A WRIT OF CERTIORARI

NORTON TOOBY*
ROSE CAHN
LAW OFFICES OF NORTON TOOBY
6333 Telegraph Avenue, Suite 200
Oakland, CA 94609
(510) 601-1300
(510) 595-6772 (fax)
**Counsel of Record*

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Should the U.S. Supreme Court grant certiorari or otherwise hold this case in abeyance pending the Court's decision in *Padilla v. Kentucky*, No. 08-651, *cert. granted*, 129 S.Ct. 1317 (Feb. 23, 2009), *oral argument held* Oct. 13, 2009, which raises an issue substantially identical to that presented here, i.e., if a criminal defense attorney falsely advises a non-citizen client that his plea of guilty will not result in deportation, can that misadvice constitute ineffective assistance of counsel under the Sixth Amendment?

LIST OF PARTIES

Pursuant to Supreme Court Rule 24.1(b), the following list identifies all of the parties before the Supreme Court of Florida:

Richard Vezina was the Petitioner below and is the Petitioner in this action. The State of Florida was the Respondent below and is the Respondent in this action.

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OPINIONS BELOW

The opinion of the Florida Supreme Court is not reported. It is reprinted in the Appendix. App. 1. The opinion of the Florida District Court of Appeal is not reported and is attached to the Appendix. App. 2. The order of the Circuit Court denying rehearing was not reported and is reprinted in the Appendix. App. 3-4. The order of the Circuit Court denying the motion to vacate the plea and sentence was not reported and is reprinted in the Appendix. App. 5-6.

JURISDICTION

Title 28 of the U.S. Code, section 1257(a) gives this Court jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had. . . ." Florida's highest court has been presented with the issue in this case and rendered a decision on August 26, 2009. App. 1. This petition is timely filed on or before November 24, 2009.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides in pertinent part that:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Section One of the Fourteenth Amendment to the U.S. Constitution provides in pertinent part that:

> No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Richard Vezina is a citizen of Canada who has lived in the United States for more than 23 years. On April 27, 1996, he married Melanee Knehr, a U.S. citizen. On January 17, 1997, he applied for adjustment of status to acquire lawful permanent residence of the United States on the basis of his marriage to a U.S. citizen. Immigration authorities granted his family-based visa petition. App. 39.

On September 14, 1997, Petitioner was arrested in Osceola County, Florida, for misdemeanor assault. *See* App. 13. The police also found a small amount of

cocaine in his possession. On February 20, 1998, he entered a nolo contendere plea to a charge of possession of cocaine, in violation of Florida Statutes section 893.13(6)(a), and the assault charge was dismissed. App. 11. On the same date, Petitioner was sentenced to 18 months probation, without any sentence to incarceration. App. 43, 47. On September 28, 2000, the immigration authorities denied his application for lawful permanent resident status on account of this controlled substances conviction. App. 40.

Prior to entry of the plea, Petitioner informed defense counsel of his immigration status. Defense counsel undertook to advise Petitioner of the immigration consequences of the plea, but erroneously informed him that a plea of nolo contendere to possession of cocaine would not cause any adverse immigration consequences. App. 31. Petitioner entered his plea in reliance on this mistaken legal advice. If he had known that this conviction would entirely disqualify him from eligibility for lawful permanent residence, and force the immigration authorities to deny his application for adjustment of status, he would have sought a nondeportable alternative disposition, such as entry of a plea to the assault charge, with dismissal of the controlled substances offense. Assault does not trigger adverse immigration consequences unless a one-year sentence to incarceration is imposed. INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F).

On October 23, 2008, Petitioner filed a Motion to Set Aside Plea and Vacate Sentence in the Circuit Court of the Ninth Judicial Circuit in Osceola County, Florida. The motion was made on grounds, *inter alia*, that defense counsel rendered ineffective assistance of counsel, in violation of the Sixth Amendment to the U.S. Constitution, by affirmatively misadvising Petitioner of the immigration consequences of the plea. App. 31. On December 17, 2008, the court denied the motion without opinion. App. 5.

On December 29, 2008, Petitioner filed a Motion for Rehearing. App. 29-42. The motion expressly argued the federal constitutional claim that the "affirmative misadvice of counsel" constituted ineffective assistance of counsel, in violation of the Sixth Amendment to the U.S. Constitution:

> The majority rule in the different federal circuit courts of appeal and many states is that defense counsel's legal advice on the immigration consequences — if it is incorrect — can constitute ineffective assistance of counsel, requiring reversal of the conviction if prejudice is shown. Affirmative misadvice by defense counsel concerning immigration consequences constitutes a federal constitutional ground to set aside a conviction, in a majority of the circuits. (Footnote and citation omitted.) The prevailing federal rule which must perforce apply as well in all state courts, holds that a conviction is legally invalid at the time it came into existence if it results from ineffective assistance of counsel

> in giving affirmative misadvice concerning the immigration consequences of the plea, so long as the error is prejudicial. (Footnotes omitted.)

App. 33-34.

Petitioner supported his motion for rehearing with an affidavit by immigration lawyer Ira Kurzban, outlining Petitioner's immigration status and explaining the severe immigration damage inflicted on Petitioner by the plea in this case. App. 39-42. This conviction forced the immigration authorities to deny Petitioner's application for lawful permanent residence, which they did on September 28, 2000. App. 40; INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II). No waiver of inadmissibility was or is available by which Petitioner could avoid inadmissiblity on account of this conviction. *See* INA § 212(h), 8 U.S.C. § 1182(h). This conviction also rendered him deportable. INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i). He was not and is not eligible for a waiver of deportability. INA § 212(c), 8 U.S.C. § 1182(c) (former law); INA § 240A(a), 8 U.S.C. § 1229b(a) (current law). On February 4, 2009, the court denied Petitioner's Motion for Rehearing without opinion. App. 3.

Petitioner appealed from the denial of these motions to the Fifth District Court of Appeal, which affirmed the lower court's rulings *per curiam* and without opinion on June 23, 2009. App. 2.

On August 12, 2009, Petitioner filed a timely Notice to Invoke Discretionary Jurisdiction in the Florida Supreme Court, on the grounds that the decision of the district court of appeals expressly ruled on a federal constitutional claim. App. 25. On August 20, 2009, Petitioner filed a petition in the Florida Supreme Court. App. 7. The issue presented was whether criminal defense counsel's affirmative misadvice to the defendant concerning the immigration consequences of the plea constitutes ineffective assistance of counsel, in violation of the Sixth Amendment to the U.S. Constitution, as applied to the states by the Fourteenth Amendment, and renders legally invalid the guilty plea which was induced by that faulty advice. App. 15.

On August 26, 2009, the Florida Supreme Court entered an order dismissing the Petition for Review, and indicating that no motion for rehearing would be entertained. App. 1.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI OR OTHERWISE HOLD THIS CASE IN ABEYANCE PENDING ITS DECISION IN *PADILLA v. KENTUCKY*, No. 08-651, WHICH RAISES ISSUES SUBSTANTIALLY IDENTICAL TO THOSE RAISED HEREIN.

The outcome of this case will be governed by this Court's decision in *Padilla v. Kentucky*, No. 08-651, *cert. granted*, 129 S.Ct. 1317 (Feb. 23, 2009), *oral argument held* Oct. 13, 2009, because the two cases present substantially identical issues. Accordingly, we respectfully request that the Court hold this petition in abeyance pending the Court's decision in *Padilla v. Kentucky*.

In *Padilla v. Kentucky*, the Court was presented with a factual and legal scenario nearly identical to that presented in the instant petition. In that case, the noncitizen Petitioner pleaded guilty to a state felony charge of marijuana drug trafficking. He did so on the erroneous advice of defense counsel that he need not worry about deportation because he had been in United States for a long enough period of time. The trafficking conviction, however, is considered an "aggravated felony" under federal law and subjected Padilla to mandatory immigration detention and deportation without the possibility of discretionary review by an immigration judge.

Despite defense counsel's erroneous advice, the Kentucky Supreme Court denied Padilla's motion to vacate his plea on the grounds of ineffective assistance of counsel. It held that advice on the "collateral consequence" of deportation is outside the scope of the Sixth Amendment guarantee and that neither counsel's failure to advise nor even counsel's affirmative misadvice about such consequences can give rise to a claim of ineffective assistance of counsel.

This Court granted Padilla's petition for a writ of certiorari, and will decide the following issues:

> (1) In providing the effective assistance guaranteed by the Sixth Amendment, does defense counsel never have a duty to investigate and advise a non-citizen client whether the offense to which he is pleading guilty will result in his deportation?
>
> (2) If a criminal defense attorney falsely advises a non-citizen client that his plea of guilty will not result in deportation, can that misadvice constitute ineffective assistance of counsel under the Sixth Amendment?

Brief of Petitioner at i, *Padilla v. Kentucky*, No. 08-651. These issues were argued before the Court on October 13, 2009.

The issues presented in *Padilla v. Kentucky* are substantially identical to those presented in the instant petition. Here, Petitioner Richard Vezina is a citizen of Canada, who has lived in the United States for more than 23 years. On April 27, 1996, he married

Melanee Knehr, a U.S. citizen. On January 17, 1997, he applied for adjustment of status to acquire lawful permanent residence of the United States on the basis of his marriage to a U.S. citizen. Immigration authorities then granted his family-based visa petition.

On September 14, 1997, he was arrested in Osceola County, Florida, for misdemeanor assault, and police found a small amount of cocaine in his possession.

Prior to entry of the plea, Petitioner's defense counsel was aware of Petitioner's immigration status but erroneously informed him that the plea of nolo contendere to possession of cocaine would not cause any adverse immigration consequences. In reliance on this mistaken legal advice, on February 20, 1998, Petitioner entered a nolo contendere plea to a charge of possession of cocaine in violation of Florida Statute section 893.13(6)(a). The assault charge was dismissed.

Contrary to defense counsel's advice, in actuality this conviction had severe, damaging, and permanent immigration consequences. It forced the immigration authorities to deny Petitioner's application for lawful permanent residence, which they did on September 28, 2000. No waiver of inadmissibility exists when a noncitizen has been convicted of such an offense. INA § 212(h), 8 U.S.C. § 1182(h). This conviction also rendered Petitioner deportable and precluded immigration authorities from issuing a waiver of deportability. INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i);

INA § 212(c), 8 U.S.C. § 1182(c) (former law); INA § 240A(a), 8 U.S.C. § 1229b(a) (current law).

Upon discovery of the severe immigration consequences of his plea, Petitioner sought post-conviction relief in the Florida state courts, contending that defense counsel rendered ineffective assistance of counsel, in violation of the Sixth Amendment, by affirmatively misadvising Petitioner concerning the immigration consequences of the plea. The Florida Circuit Court, District Court of Appeal, and Supreme Court denied relief. App. 5, 3, 2, 1.

Like Padilla, Petitioner seeks review by this Court to determine whether a criminal defense attorney's affirmative misadvice that a noncitizen defendant's plea will not result in adverse immigration consequences can constitute ineffective assistance of counsel under the Sixth Amendment to the U.S. Constitution.

This Court's resolution of *Padilla* may demonstrate that the Florida courts wrongly denied Petitioner's post-conviction motion to set aside his plea. For this reason, we respectfully request that the Court either grant certiorari and schedule briefing and oral argument, or hold its decision in abeyance pending resolution of *Padilla v. Kentucky*, and thereafter grant certiorari and remand the case to the Florida Supreme Court for reconsideration in light of its decision in *Padilla*.

CONCLUSION

For the foregoing reasons, Petitioner asks the Court to issue a writ of certiorari and schedule briefing and oral argument, or hold its decision in abeyance pending the resolution of *Padilla v. Kentucky*, and thereafter grant certiorari and remand this case to the Florida Supreme Court for reconsideration in light of its decision in *Padilla*.

Respectfully submitted,

NORTON TOOBY*
ROSE CAHN
LAW OFFICES OF NORTON TOOBY
6333 Telegraph Avenue,
Suite 200
Oakland, CA 94609
(510) 601-1300
(510) 595-6772 (fax)
**Counsel of Record*

Supreme Court of Florida

WEDNESDAY, AUGUST 26, 2009

CASE NO.: SC09-1537
Lower Tribunal No(s).: SD09-859, 49-97-CF-1899

RICHARD VEZINA vs. STATE OF FLORIDA

Petitioner(s) Respondent(s)

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. *See Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980).

No motion for rehearing will be entertained by the Court.

A True Copy
Test:

/s/ Thomas D. Hall [SEAL]
Thomas D. Hall
Clerk, Supreme Court

jn
Served:

HON. SUSAN WRIGHT, CLERK
CHRISTOPHER L. SMITH
HON. BILL MCCOLLUM
HON. SCOTT DAVID POLODNA, JUDGE
HON. MALCOM THOMPSON, CLERK

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 2009

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

RICHARD VEZINA,

Appellant,

v.

CASE NO. 5D09-859

STATE OF FLORIDA,

Appellee.

/

Decision filed June 23, 2009

3.850 Appeal from the Circuit Court for Osceola County, Scott Polodna, Judge.

Christopher L. Smith, Orlando, for Appellant.

No Appearance for Appellee.

PER CURIAM.

AFFIRMED.

PALMER, C.J., LAWSON and EVANDER, JJ., concur.

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR OSCEOLA COUNTY, FLORIDA

FELONY DIVISION 201
CASE NO.: CR97-1899

STATE OF FLORIDA,

Plaintiff,

vs.

RICHARD VEZINA,

Defendant. /

ORDER DENYING DEFENDANT'S MOTION FOR REHEARING

THIS CAUSE having come before the Court on this day, upon the Motion for Rehearing which was filed December 29, 2008, and being otherwise fully advised in the premises, it is hereby:

ORDERED AND ADJUDGED that said motion is hereby DENIED.

DONE AND ORDERED in Chambers at Kissimmee, Osceola County, Florida this 4th day of February, 2009.

/s/ Scott Polodna
SCOTT POLODNA, Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by interoffice/U.S. Mail delivery to the Office of the State Attorney, via interoffice mail; and Christopher L. Smith, Esquire, via facsimile 407-841-2889, this 5th day of February, 2009.

/s/ [Illegible]
Judicial Assistant

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR OSCEOLA COUNTY, FLORIDA

FELONY DIVISION 201
CASE NO.: CR97-1899

STATE OF FLORIDA,

Plaintiff,

vs.

RICHARD VEZINA,

Defendant. /

ORDER DENYING MOTION TO SET ASIDE PLEA AND VACATE SENTENCE

THIS CAUSE having come before the Court on this day, upon the Motion to Set Aside Plea and Vacate Sentence which was filed October 23, 2008, and being otherwise fully advised in the premises, it is hereby:

ORDERED AND ADJUDGED that said motion is hereby DENIED.

DONE AND ORDERED in Chambers at Kissimmee, Osceola County, Florida this 16th day of December, 2008.

/s/ Scott Polodna
SCOTT POLODNA, Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by interoffice/U.S. Mail delivery to the Office of the State Attorney, via interoffice mail; and Christopher L. Smith, Esquire, via facsimile 407-841-2889, this 17th day of December, 2008.

/s/ [Illegible]
Judicial Assistant

App. 7

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

RICHARD VEZINA, Petitioner,

v.

STATE OF FLORIDA, Respondent

PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER L. SMITH, ESQ.
Counsel of Record
390 North Orange Ave.,
Suite 2100 Orlando, FL 32801
TEL. 407-897-6888
FAX: 407-841-2889
Florida Bar No. 367461
Counsel for Petitioner

August 20, 2009

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PETITION FOR WRIT OF CERTIORARI

Richard Vezina respectfully petitions for a writ of certiorari to review the judgment of the District Court of Appeal of Florida for the Fifth District affirming the denial of Petitioner's Motions to Set Aside Plea and Rehearing by the Trial Court below.

BASIS FOR INVOKING JURISDICTION

Comes now Petitioner, **RICHARD VEZINA,** and pursuant to Article V, Section 3(b)(3), Florida Constitution, Fla. R. App. P. 9.100 and 9.030(a)(2)1A ii and the Sixth and Fourteenth Amendments to the United States Constitution, files this petition seeking review by this Court's certiorari jurisdiction in that the lower court affirmed an Order of he trial court denying the Petitioner's Motion for Post Conviction Relief and Rehearing without holding an evidentiary hearing.

FACTS UPON WHICH PETITIONER RELIES

This matter began pursuant to Defendant's Motion to Set Aside Plea and Vacate Sentence.

On February 20, 1998, the Petitioner entered a Plea and was sentenced to probation for the offense of Possession of Cocaine. The Defendant successfully completed his probationary sentence.

When the Petitioner entered the Plea, there was no information with respect to the immigration consequences on the Plea form.

A transcript of the plea demonstrated that the trial judge made a fleeting reference to immigration consequences but did not fully inform the Petitioner to comply with Rule 3.172(c)(8), which requires the Court to take the Plea and advise the Defendant in every case before the Plea of the possibility of deportation as a result of the conviction.

The Court did not ask the Defendant if he understood that his plea could lead to deportation. The plea form contains no immigration warning. The judge, however, orally warned the Defendant: "I have to tell you that if you're not a citizen of the United States, this plea could be used to deport you." (T 4:8-10). The court in taking the plea must advise the defendant, in every case before plea, of the possibility of deportation as a result of the conviction. The court must go further and ask the defendant whether he *understands* this warning. This, the court failed to do.

At all times while this matter was pending and pursuant to reviewing the Plea form with his trial attorney, the Petitioner's attorney informed him that this Plea would not result in any immigration consequences.

The Petitioner has now learned that the entry of the plea in this cause has denied him lawful permanent residence, nor can he obtain U. S. Citizenship. Further, as of October 26, 2006, the Petitioner learned that he could be subject to deportation

In September, 2007, the Petitioner met with an attorney and was advised that the time for the filing of the motion for post conviction relief, pursuant to Rule 3.850 did not end until two years after the Petitioner "obtained knowledge" of the consequences.

This situation involved affirmative misadvice by the Petitioner's counsel, thus it is not subject to a *Strickland* standard for review.

The Petitioner is a citizen of Canada who has lived in the United States for more than 22 years. He has been married to a United States citizen since 1996, and wants to become a lawful permanent resident of the United. States.

In order to obtain lawful permanent resident status, the Petitioner needs to vacate the 1998 conviction for possession of cocaine.

The Petitioner was represented by Michael Entin, Esq., and Steve Jablon, Esq. The Petitioner's counsel, Steven Jablon, Esq., who made the court appearance for the plea was aware the Petitioner was not a U. S. Citizen. The Petitioner specifically discussed the immigration consequences of the case with Mr. Entin who affirmatively advised the Defendant that the plea would not expose him to deportation.

The Petitioner would not have entered a plea to this offense had he known the drug offense would subject him to deportation. This case arose out of an assault investigation. Assault is not a deportable offense, so long as a one year custody sentence is not imposed. The Petitioner could have entered a plea to an assault charge instead of the possession charge, and thereby avoided deportation.

The procedural history is as follows: Defendant filed a Motion to Set Aside Plea and Vacate Sentence on October 22, 2008. Subsequent to the Motion being filed, the Court granted an Evidentiary Hearing in this matter which was scheduled for December 16, 2008. On or about December 10, 2008, the State filed

a Response to Defendant's Motion for Post Conviction Relief. On December 15, 2008, while the undersigned was in a jury trial, the undersigned received an e-mail from the State seeking a continuance of the Hearing based upon the fact that they had not received sufficient notice and their witnesses were not subpoenaed. Subsequent to that e-mail, on December 17, 2008, undersigned counsel received an Order Denying Motion to Set Aside Plea and Vacate Sentence. There were no findings in the Order for the undersigned to determine why said Motion was denied without Hearing. Nor, was there any explanation as to why a hearing had been scheduled but was no longer to be held.

The response filed by the State to Defendant's Motion to Set Aside Plea and Vacate Sentence was based on two grounds:

(a) That the Court had provided sufficient warning regarding immigration consequences which was contained in the transcript of the Plea;

(b) That the Defendant failed to state prejudice to warrant the granting of the Motion.

The Petitioner filed a timely Motion for Rehearing. The trial court below denied the Motion for Rehearing and the Petitioner filed a timely Notice of Appeal on February 26, 2009. On June 23, 2009, the Fifth District Court of Appeal returned a Per Curiam Affirmed opinion which was rendered on July 15, 2009.

ISSUE

Whether criminal defense counsel's affirmative misadvice to the defendant concerning the immigration consequences of a plea constitutes ineffective assistance of counsel, in violation of the Sixth Amendment to the United States Constitution, as applied to the statues [sic] by the Fourteenth Amendment, rendering the guilty plea which was induced by that faulty advice legally invalid?

ARGUMENT

The Defendant's Motion to Set Aside Plea and Vacate Sentence is specifically predicated upon the ground that he received affirmative misadvice of counsel. This type of review is not subject to the *Strickland* standard and the only determination for the Court is to see if, in fact, affirmative misadvice occurred. The State does not allege any matters within their response which denies that the Petitioner received affirmative misadvice from his attorney and as such, Petitioner is entitled to an Evidentiary Hearing on that issue alone. *Rensoli v. State*, 718 So.2d 1278 (3rd DCA 1998).

The Petitioner sufficiently alleged prejudice that resulted from the affirmative misadvice of counsel. The State, in their response, incorrectly represents that deportation is the only prejudice that could result from the affirmative misadvice from the attorney and therefore, his claim should be summarily denied. The immigration consequences are outlined in

Petitioner's Motion to Set Aside Plea and Vacate Sentence. The consequences are further substantiated by an Affidavit from an expert witness detailing how the Plea affected the Petitioner's immigration status here in the United States.

It is clear from the case law in the State of Florida that misadvice by counsel regarding any issue which later turns out not to be true and prejudices the Petitioner in any manner entitles him to relief in this cause. *Benelhocine v. State*, 787 So.2d 38 (2nd DCA 2001). Further, the Petitioner is entitled to an Evidentiary Hearing on his Motion when he alleges counsel affirmatively told him that there could be ***no*** immigration consequences for the entry of his Plea. *Ghanavati v. State*, 820 So.2d 989 (4th DCA 2002).

The state suggests that the court's boilerplate advice about possible deportation should "trump" defense counsel's advice concerning the actual immigration consequences of the case for the particular defendant. The court gives exactly the same advice to every single defendant (even including U.S. citizen defendants), even though each defendant's immigration situation may be different, and the specific immigration consequences for each defendant may be different. It is proper for the court to give generalized advice, to raise a red flag about a damaging possible consequence, so the defendant and defense counsel can look into the danger, and see if it is really there. After ascertaining whether the particular defendant is indeed a foreign national subject in danger of deportation, competent defense counsel will look into

it directly or by seeking advice from immigration counsel on the exact immigration consequences of the particular plea for the particular defendant, and then advise the defendant as to the actual immigration consequences of this particular plea. If they are damaging, defense counsel and the defendant can try to negotiate an immigration harmless disposition if possible. Then, defense counsel would presumably – based on the investigation of the immigration facts, and legal research into the immigration law or consultation with an expert – advise the client that this plea will not in fact result in deportation. Obviously, a reasonable defendant will place more confidence in this informed legal opinion, supported by the facts and law relating to his or her individual case, than in the court's generalized, blind, boilerplate advice given to all defendants, even U.S. citizens.

The majority rule in the different federal circuit courts of appeal and many states is that defense counsel's legal advice on the immigration consequences – if it is incorrect – can constitute ineffective assistance of counsel, requiring reversal of the conviction if prejudice is shown. Affirmative misadvice by defense counsel concerning immigration consequences constitutes a federal constitutional ground to set aside a conviction, in a majority of the circuits.[1]

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[1] See N. TOOBY, POST-CONVICTION RELIEF FOR IMMIGRANTS §6.18 (2004)

The prevailing federal rule[2] which must perforce apply as well in all state courts, holds that a conviction is legally invalid at the time it came into existence if it results from ineffective assistance of counsel in giving *affirmative misadvice* concerning the immigration consequences of the plea, so long as the error is prejudicial.[3]

The giving of the court's generalized advice, pursuant to a state statute, obviously cannot and does not excuse counsel's constitutional error in violation of the U.S. Constitution. See *In re Resendiz*, 25 Cal.4th 230, 240-242; 19 P.3d 1171, 1177-1179 (2001).

The State argued that a statement during the plea proceedings that no other promises have been

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[2] *United States* v. *Couto*, 311 F.3d 179 (2d Cir. 2002) (defense counsel gave affirmative misadvice by saying that a conviction would not trigger deportation, where in fact it was an aggravated felony triggering mandatory deportation); see also *Dmvlls-Morgan* [sic] v. *United States*, 765 F.2d 1534, 1541 (11th Cir. 1985); *Holmes* v. *United States*, 876 F.2d 1545 (11th Cir. 1989); *Ostrander* v. *Green*, 46 F.3d 347,355 (4th Cir. 1995), *overruled on other grounds, O'Dell* v. *Netherland*, 95 F.3d 214,1222-23 (4th Cir. 1996); *Bowers* v. *Saffle*, 216 F.3d 918, 925-26 (10th Cif. [sic] 2000); *Goodall v. United States*, 759 A.2d 1077. 1082 (D.C. App. 2000); *Hill* v. *Lockhart*, 894 F.2d 1009 (8th cir. 1999), *cert. denied*, 497 U.S. 1011 (1999).

[3] *United States v. Kwan*, 407 F.3d 1005, 1014 (9th Cir. 2005) (affirmative misadvice concerning adverse immigration consequences of a plea constitutes ineffective assistance of counsel); see *In re Resendiz*, 25 Cal.4th 230 (2001) (reviewing federal authorities on this point, and applying them in a state case).

made to induce the plea applies to defense counsel's legal advice concerning immigration consequences. This is not true. The language concerning promises always refers to direct penal consequences in. criminal court, such as dismissal of charges or promises as to sentence; things the criminal court will impose as sentence. The reference to promises has nothing to do with what a different federal agency might or not do at some future time and place in a completely different proceeding. There is no reason to believe that anyone, much less the defendant, understood "promises" in that context to apply to defense counsel's legal advice concerning the immigration consequences of the plea.

The State argued that if defense counsel made that promise, it must have been correct at the time, because Mr. Vezina had no concerns for over 10 years after the plea was entered. This is not true. Mr. Vezina believed defense counsel's incorrect statement that the Plea would in fact not result in his deportation. He never learned that this advice was wrong until late in 2006. The evidence in support of the motion establishes that defense counsel's immigration advice was mistaken under the law at the time of the plea. The State has produced no evidence, and only a false inference, to the contrary.

The State asserted that the main purpose of the rule is to tell the defendant the potential for deportation. This is correct. Once so informed, the defendant and defense counsel – as indicated above – will see whether the danger applies to the specific

defendant and specific plea and try to avert it, and defense counsel will go beyond the court's generalized advice and tell the client what the situation is in his or her specific case.

The State argued the motion was legally insufficient under *Green*. The *Green* decision, however, has no application to a claim of ineffective assistance of counsel, such as the claim raised here. Its application is limited to claims of violation of the rule.

The State claimed that Mr. Vezina is not threatened with deportation, but simply filing the motion as a safety measure three days before the deadline. The State, however, confuses deportation with inadmissibility. The rule merely requires the court to warn the defendant about the possibility of deportation. Counsel's obligation to give accurate immigration advice – if counsel gives such, advice at all – is not so limited. There are many different forms of damaging immigration consequences that may be triggered by criminal convictions. Chief among them are (a) deportation (where one is thrown out of the country after first being legally admitted), and (b) inadmissibility (where a person is barred – as Mr. Vezina is barred – from obtaining Lawful Permanent Resident status or barred from entry into the U.S. from abroad). The second consequence is the one causing damage to Mr. Vezina. As the evidence in support of the motion establishes, this conviction forces the immigration authorities to deny his application for Lawful Permanent Resident status,

after which he will be removed from the country for lack of legal status. "Technically, this is not "deportation," but it amounts to the same thing, and he is certainly threatened with it as a result of this conviction since it is absolutely certain to occur. This was proven in the evidence submitted in support of the Motion.

There can be no doubt that a lawyer's *misadvising* the client on legal questions of importance to the plea, without exercising even reasonable diligence to investigate the issue, is "objectively unreasonable" in almost all circumstances. "Counsel who gives erroneous advice to a client which influences a felony conviction is worse than no lawyer at all. Common sense dictates that such deficient lawyering goes to effectiveness." *United States v. Couto*, 311 F.3d at 187 (2bd Cir. 2002). The overwhelming majority of courts that apply the collateral consequences rule to failure-to-advise claims also hold that that rule does not apply where counsel misadvises the defendant.

A criminal defendant is highly vulnerable in a criminal prosecution. As noted above, "the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty. . . ." *Zerbst*, 304 U.S. at 462-63. Guilty pleas in particular, because they result in convictions, demand "the utmost solicitude" for the defendant. *Nixon*, 543 U.S. at 187. "[I]ntellingent assessment of he relative advantages of pleading guilty is frequently impossible without the assistance of any attorney," *Brady*, 397 U.S. at

749 n.6., including an independent examination of the law as applied to the facts. *Von Moltke*, 332 U.S. at 721. Thus, the defendant necessarily relies on the accuracy of the representations defense counsel makes regarding the law and its applications, for typically the defendant lacks the wherewithal to question them.

Deportation consequences will commonly be important to plea decisions, and in some circumstances the most important factor. *St. Cyr*, 533 U.S. at 322. Thus, it is a breach of trust and of the special relationship between counsel and client for counsel to render advice, without even investigating its accuracy, on matters so critical to the defendant in deciding whether to plead guilty to a felony and forfeit his constitutional rights, The Ninth Circuit so concluded in *Kwan*, reasoning that even if counsel did not have to give the defendant advice about deportation, misleading him on the subject was "objectively unreasonable under contemporary standards for attorney competence." 407 F.3d at 1015-16. Having held himself out as competent to provide advice on the subject, counsel violated "a basic rule of professional conduct that a lawyer must maintain competence by keeping abreast of changes in the law and its practice." *Id.* At 1016 (citing Model Rules of Prof'l Conduct R. 1.1[6]).

False representations that the attorney freely makes on legal mattes [sic] distort the defendant's decision to plead guilty. It is common to draw a line

in the law based on the decision to speak in circumstances where one induces reliance. For example, absent an independent duty to speak, silence will not give rise to liability for negligent misrepresentation. But if a professional supplies false information that induces justifiable reliance by others, he will be liable for failing to exercise due care. *Restatement (Second) of Torts* § 552 (1965). On the same principle, if a lawyer supples false information about deportation consequences that affects the defendant's decision to plead guilty, the lawyer has been ineffective in assisting the defendant, even if he had no duty to investigate collateral consequences in the first place. "One would not suppose that the collateral consequence rule . . . would apply in a situation in which defendant's guilty plea was induced by actual misadvice respecting some collateral consequence when that consequence was of substantial importance to the defendant." *Mott v. State*, 407 N.W.2d at 583-84 (internal quotation marks omitted). "If the defendant's pleas were made in reasonable reliance upon the advise or representation of his attorney, which, advice or representations demonstrated incompetence, then it can be said that the defendant's pleas were not voluntary[.]" *People v. Correa*, 485 N.E.2d at 310; *accord Strader*, 611 F.2d at 65. *See also Evitts v. Lucey*, 469 U.S. 387 (1985) (State has not obligation to provide appeal, but must assure effective assistance of counsel if appeal is provided).

See Santobello v. New York, 404 U.S. 257, 262 (1971). In *Brady*, the Court recognized that

misrepresentation by the court, the prosecutor, or his own counsel that induces a plea materially invalidates it. 397 U.S. at 755. In the same vein, false representations by incompetent counsel on the critical issue of deportation that prejudicially induce a guilty plea should give rise to a Sixth Amendment claim.

CONCLUSION

Affirmative misadvice by counsel as to the immigration consequences of the entry of a plea violates the Sixth and Fourteenth Amendments of the United States Constitution. Where evidence of said misadvice is uncontroverted, an evidentiary hearing should be held.

This Court should vacate the ruling of the Fifth District Court of Appeal and Trial Court and remand this matter for an evidentiary hearing.

Respectfully submitted,

/s/ Christopher L. Smith
CHRISTOPHER L. SMITH, ESQ.
390 North Orange Avenue,
Suite 2100
Orlando, FL 32801
TEL: 407-897-6888
FAX: 407-841-2889
Florida Bar No. 367461
COUNSEL FOR PETITIONER

[Certificate Of Service And Certificate Of Compliance Omitted In Printing]

IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

RICHARD VEZINA,

Appellant/Petitioner,

v. CASE NO. 5D09-859

STATE OF FLORIDA,

Appellee/Respondent. /

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

Notice is hereby given that RICHARD VEZINA, Appellant/Petitioner, invokes the discretionary jurisdiction of the Supreme Court of Florida to review the decision of the Fifth District Court of Appeal rendered on July 15, 2009. The basis for jurisdiction is that the opinion of the Fifth District Court of Appeal expressly construes a provision of the federal constitution.

[Certificate Of Service Omitted In Printing]

LAW OFFICE OF
CHRISTOPHER L. SMITH
390 N. Orange Ave., Suite 2100
Orlando, Florida 32801
TEL: 407-897-6888
FAX: 407-841-2889
e-mail: chrislegalcounsel@yahoo.com

/s/ Christopher L. Smith
CHRISTOPHER L. SMITH
Florida Bar No. 367461
Attorney for Appellant/Petitioner

RICHARD VEZINA

v.

STATE OF FLORIDA

5D09-859

Mandate was forwarded to trial court today.
Clerk, Fifth District Court of Appeal,
Daytona Beach

JUL 17 2009 JUL 15 2009

IN THE CIRCUIT COURT
OF THE NINTH JUDICIAL
CIRCUIT IN AND FOR
OSCEOLA COUNTY, FLORIDA
CRIMINAL JUSTICE DIVISION

CASE NO. 79-97-CF-1899

STATE OF FLORIDA,

Plaintiff,

v. Honorable Scott Polodna

RICHARD VEZINA,

Defendant. /

NOTICE OF APPEAL

NOTICE is hereby given that the Defendant, **RICHARD VEZINA**, appeals to the Fifth District Court of Appeal, State of Florida, the trial Court's denial of Defendant's Motion to Set Aside Plea and Vacate Sentence and the Court's denial of Defendant's Motion for Rehearing.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by Facsimile/ Hand-Delivery/U. S. Mail to the Office of the State Attorney, No. 2 Courthouse Square, Suite 3500, Kissimmee, FL, 34741, the Office of the Attorney General Fifth District, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118; and to the

Defendant, Richard Vezina, 1014 Southeast 12th Avenue, Deerfield Beach, FL 32441 on this 26 day of February, 2009.

/s/ Christopher L. Smith
CHRISTOPHER L. SMITH, ESQ.
390 North Orange Avenue,
Suite 2100
Orlando, FL 32801
TEL: 407-897-6888
FAX: 407-841-2889
Florida Bar No. 367461
Attorney for Defendant

IN THE CIRCUIT COURT
OF THE NINTH JUDICIAL
CIRCUIT IN AND FOR
OSCEOLA COUNTY, FLORIDA
CRIMINAL JUSTICE DIVISION

CASE NO. 79-97-CF-1899

STATE OF FLORIDA,

Plaintiff,

v. Honorable Scott Polodna

RICHARD VEZINA,

Defendant. /

DEFENDANT'S MOTION FOR REHEARING

COMES NOW the Defendant, **RICHARD VEZINA,** by and through his undersigned attorney, and pursuant to Rule 3.850(g), FRCrP, moves this Honorable Court to grant a Rehearing on the Motion to Set Aside Plea and Vacate Sentence in this cause and as grounds therefore would show:

1. This matter began pursuant to Defendant's Motion to Set Aside Plea and Vacate Sentence.

2. (a) The procedural history is as follows: Defendant filed a Motion to Set Aside Plea and Vacate Sentence on October 22. 2008.

(b) Subsequent to the Motion being filed, the Court granted an Evidentiary Hearing in this matter which was scheduled for December 16, 2008.

(c) On or about December 10. 2008, the State filed a Response to Defendant's Motion for Post Conviction Relief.

(d) On December 15, 2008, while the undersigned was in a jury trial, the undersigned received an e-mail from the State seeking a continuance of the Hearing based upon the fact that they had not received sufficient notice and their witnesses were not subpoenaed.

(e) Subsequent to that e-mail, on December 17, 2008, undersigned counsel received an Order Denying Motion to Set Aside Plea and Vacate Sentence. There were no findings in the Order for the undersigned to determine why said Motion was denied without Hearing.

3. That response filed by the State to Defendant's Motion to Set Aside Plea and Vacate Sentence was based on two grounds:

(a) That the Court had provided sufficient warning regarding immigration consequences which was contained in the transcript of the Plea;

(b) That the Defendant failed to state prejudice to warrant the granting of the Motion.

4. The Defendant's Motion to Set Aside Plea and Vacate Sentence is specifically predicated upon the ground that he received affirmative misadvice of counsel. This type of review is not subject to the *Strickland* standard and the only determination for the Court is to see if, in fact, affirmative misadvice

occurred. The State does not allege any matters within their response which denies that the Defendant received affirmative misadvice from his attorney and as such, is entitled to an Evidentiary Hearing on that issue alone. *Rensoli v. State,* 718 So.2d 1278 (3rd DCA 1998).

5. The Defendant sufficiently alleged prejudice that resulted from the affirmative misadvice of counsel. The State, in their response, incorrectly represents that deportation is the only prejudice that could result from the affirmative misadvice from the attorney and therefore, his claim should be summarily denied. The immigration consequences are outlined in Defendant's Motion to Set Aside Plea and Vacate Sentence. This is further substantiated by the Affidavit from an expert witness detailing how the Plea affected the Defendant's immigration status here in the United States. A copy of said Affidavit is attached hereto and incorporated herein for all purposes as Exhibit "A".

6. It is clear from the case law in the State of Florida that misadvice by counsel regarding any issue which later turns out not to be true and prejudices the Defendant in any manner entitles him to relief in this cause, *Benelhocine v. State,* 787 So.2d 38 (2nd DCA 2001). Further, the Defendant is entitled to an Evidentiary Hearing on his Motion when he alleges counsel affirmatively told him that there could be ***no*** immigration consequences for the entry of his Plea. *Ghanavati v. State,* 820 So.2d 989 (4th DCA 2002).

MEMORANDUM OF LAW

The state suggests that the court's boilerplate advice about possible deportation should "trump" defense counsel's advice concerning the actual immigration consequences of the case for the particular defendant. (Response 2.) The court gives exactly the same advice to every single defendant (even including U.S. citizen defendants), even though each defendant's immigration situation may be different, and the specific immigration consequences for each defendant may be different. It is proper for the court to give generalized advice, to raise a red flag about a damaging possible consequence, so the defendant and defense counsel can look into the danger, and see if it is really there. After ascertaining whether the particular defendant is indeed a foreign national subject to danger of deportation, competent defense counsel will look into it directly or by seeking advice from immigration counsel on the exact immigration consequences of the particular plea for the particular defendant, and then advise the defendant as to the actual immigration consequences of this particular plea. If they are damaging defense counsel, and the defendant can try to negotiate an immigration harmless disposition if possible. Then, defense counsel would presumably – based on the investigation of the immigration facts, and legal research into the immigration law or consultation with an expert – advise the client that this plea will not in fact result in deportation. Obviously, a reasonable defendant will place more confidence in this informed legal opinion,

supported by the facts and law relating to his or her individual case, than in the court's generalized, blind, boilerplate advice given to all, defendants, even U.S. citizens.

The majority rule in the different federal circuit courts of appeal and many states is that defense counsel's legal advice on the immigration consequences – if it is incorrect – can constitute ineffective assistance of counsel, requiring reversal of the conviction if prejudice is shown. Affirmative misadvice by defense counsel concerning immigration consequences constitutes a federal constitutional ground to set aside a conviction, in a majority of the circuits.[1] See N. Tooby & 1. [sic] ROLLIN, CRIMINAL DEFENSE OF IMMIGRANTS § 11.70(D). The prevailing federal rule[2] which must perforce apply as well in all state courts, holds that a conviction is legally invalid at the time it came into existence if it results from

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[1] See N. TOOBY, POST-CONVICTION RELIEF FOR IMMIGRANTS §6.18 (2004)

[2] *United States v. Couta*, 311 F.3d 179 (2d Cir. 2002) (defense counsel gave affirmative misadvice by saying that a conviction would not trigger deportation, where in fact it was an aggravated felony triggering mandatory deportation); see also *Dmvils-Morgan* [sic] *v. United States*, 765 F.2d 1534, 1541 (11th Cir 1985); *Holms v. United States*, 876 F.2d 1545 (11th Cir. 1989); *Ostrander v. Green*, 46 F.3d 347, 355 (4th Cir. 1995), *overruled on other grounds, O'Dell v. Netherland*, 95 F.3d 214, 1222-23 (4th Cir. 1996); *Bowers v. Saffle*, 216 F.3d 918, 925-26 (10th Cir. 2000); *Goodall v. United States*, 759 A.2d 1077, 1082 (D.C. App. 2000); *Hill v. Lockhart*, 894 F.2d 1009 (8th Cir. 1999), *cert. denied*, 497 U.S. 1011 (1999).

ineffective assistance of counsel in giving *affirmative misadvice* concerning the immigration consequences of the plea, so long as the error is prejudicial.[3]

The giving of the court's generalized advice, pursuant to a state statute, obviously cannot and does not excuse counsel's constitutional error in violation of the U.S. Constitution. See *In re Resendiz,* 25 Cal.4th 230, 240-242; 19 P.3d 1171, 1177-1179 (2001).

The State argues that a statement during the plea proceedings that no other promises have been made to induce the plea applies to defense counsel's legal advice concerning immigration consequences, (Response 3.) This is not true. The language concerning promises always refers to direct penal consequences in criminal court, such as dismissal of charges or promises as to sentence; things the criminal court will impose as sentence. The reference to promises has nothing to do with what a different federal agency might or not do at some future time and place in a completely different proceeding. There is no reason to believe that anyone, much less the defendant, understood "promises" in that context to apply to defense counsel's legal advice concerning the immigration consequences of the plea.

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[3] *United States v. Kwan*, 407 F.3d 1005, 1014 (9th Cir. 2005) (affirmative misadvice concerning adverse immigration consequences of a plea constitutes ineffective assistance of counsel); see *In re Resendiz,* 25 Cal.4th 250 (2001) (reviewing federal authorities on this point, and applying them in a state case).

The State argues that if defense counsel made that promise, it must have been correct at the time, because Mr. Vezina had no concerns for over 10 years after the plea was entered. (Response 3.) This is not true. Mr. Vezina believed defense counsel's incorrect statement that the Plea would in fact not result in his deportation. He never learned that this advice was wrong until late in 2006. The evidence in support of the motion establishes that defense counsel's immigration advice was mistaken under the law at the time of the plea. The State has produced no evidence, and only a false inference, to the contrary.

The State says the main purpose of the rule is to tell the defendant the potential for deportation. (Response 3.) This is correct. Once so informed, the defendant and defense counsel – as indicated above – will see whether the danger applies to the specific defendant and specific plea and try to avert it, and defense counsel will go beyond the court's generalized advice and tell the client what the situation is in his or her specific case. See point 1, above.

The State argues the motion is legally insufficient under Green. (Response 3-4.) The *Green* decision, however, has no application to a claim of ineffective assistance of counsel, such as the claim raised here. Its application is limited to claims of violation of the rule.

The State claims that Mr. Vezina is not threatened with deportation, but simply filing the motion as a safety measure three days before the

deadline. (Response 4.) The State, however, confuses deportation with inadmissibility. The rule merely requires the court to warn the defendant about the possibility of deportation. Counsel's obligation to give accurate immigration advice – if counsel gives such advice at all – is not so limited. There are many different forms of damaging immigration consequences that may be triggered by criminal convictions. Chief among them are (a) deportation (where one is thrown out of the country after first being legally admitted), and (b) inadmissibility (where a person is barred – as Mr. Vezina is barred – from obtaining Lawful Permanent Resident status or barred from entry into the U.S. from abroad). The second consequence is the one causing damage to Mr. Vezina. As the evidence in support of the motion establishes, this conviction forces the immigration authorities to deny his application for Lawful Permanent Resident status, after which he will be removed from the country for lack of legal status. Technically, this is not "deportation," but it amounts to the same thing, and he is certainly threatened with it as a result of this conviction since it is absolutely certain eventually to occur. This was proven in the evidence submitted in support of the Motion.

WHEREFORE, the Defendant prays this Honorable Court grant a Re-Hearing on this matter and set an Evidentiary Hearing to determine the validity of the Motion.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Facsimile/

Hand-Delivery/U. S. Mail to Wilson Green, Esq., Assistant State Attorney, P. O. Box 1673, Orlando, FL 32802-1672, this 23rd day of December 2008.

/s/ Christopher L. Smith
CHRISTOPHER L. SMITH, ESQ.
390 North Orange Ave.,
Suite 2100
Orlando, FL 32801
TEL: 407-897-6888
FAX: 407-841-2889
Florida Bar No. 367461
Attorney for Defendant

AFFIDAVIT

STATE OF FLORIDA)
)
CITY OF MIAMI)

BEFORE ME the undersigned authority appeared IRA J. KURZBAN who after being duly sworn deposes and says:

1. My name is Ira J. Kurzban and I am a partner at Kurzban, Kurzban, Weinger & Tetzeli, P.A.

Biography

I received my J.D. and M.A. degrees from the University of California at Berkeley. I am also the past-President and former General Counsel of the

American Immigration Lawyers Association ("AILA"). I have been named by the National Law Journal as one of the top twenty immigration lawyers in the United States and was named in the Best Lawyers in America for my work in immigration and labor law. I am also the first recipient of the Tobias Simon *Pro Bono* Award presented by the Chief Justice of the Florida Supreme Court, the Lawyers of the Americas Award for my work on behalf of human rights in this hemisphere given by the University of Miami, the Jack Wasserman Award for excellence in federal litigation, the Edith Lowenstein Memorial Award for excellence in the advancement of immigration law given by the American Immigration Lawyers Association ("AILA"), and the Carol King Award for my efforts in immigration law given by the National Lawyers Guild. I am also Florida Bar Board Certified in Immigration and Nationality Law and have received an AV Peer Review Rating by Martindale-Hubbell for excellence in practicing law. In addition, I have litigated over fifty federal cases concerning the rights of aliens, including *Jean v. Nelson*, *Commissioner v. Jean*, and *McNary v. Haitian Refugee Center, Inc.*, which I argued before the United States Supreme Court. I have been granted an honorary degree by the University of Pennsylvania School of Law and I am the recipient of the Wasserstein Fellowship by Harvard University School of Law. I am also an adjunct faculty member in Immigration and Nationality Law at the University of Miami School of Law and Nova University School of Law and have lectured

and published extensively in the field of immigration law, including articles in the Harvard Law Review and San Diego Law Review. In addition, I am the author of the most widely used one volume treatise in Immigration and Nationality Law, titled "*Kurzban's Immigration Law Sourcebook*." I have rendered expert opinions and been recognized as an expert in Immigration and Nationality Law in cases in both state and federal courts.

Immigration Consequences of Mr. Vezina's Criminal Convictions

2. Richard Vezina ("Mr. Vezina") is a citizen and national of Canada. He married Malanee [sic] Knehr, a United States citizen, on or about April 27, 1996, in Dania, Florida.

3. On February 20, 1998, Mr. Vezina entered a Plea and was sentenced to probation for the offense of possession of Cocaine, in violation of Florida Statute Section 893.13, in the Circuit Court of the Ninth Judicial Circuit in and for the Osceola County, Florida (Case No.: 49-97-CF-1899).

4. Mr. Vezina applied for adjustment of status to acquire lawful permanent residence of the United States on January 17, 1997. Mr. Vezina applied for adjustment of status based on his marriage to a United States citizen, Melanee Vezina (formerly Melanee Knehr). He is the beneficiary of an approved family-based visa petition filed by his United States citizen

spouse, which allowed him to seek adjustment of status to that of a lawful permanent resident of the United States.

5. Mr. Vezina's adjustment of status application was denied by Citizenship and Immigration Service ("CIS"), formerly legacy Immigration and Naturalization Service ("INS"), because of his cocaine conviction. The adjustment of status application was denied pursuant to the Immigration and nationality Act ("INA") Section 212(a)(2)(A)(i)(II) (controlled substance violations). The adjustment of status application was solely denied based on Mr. Vezina's cocaine conviction. There were no other grounds used by CIS to deny Mr. Vezina's adjustment of status application.

6. Mr. Vezina's 1998 guilty plea to the charge of possession of cocaine clearly and unequivocally subjects him to deportation, exclusion, and/or removal from the United States.

7. Based on the possession of cocaine conviction, Mr. Vezina is currently removable pursuant to INA §237(a)(2)(B)(i) (controlled substances), 8 USC §1227(a)(2)(B). In addition, at this time, if Mr. Vezina travels outside of the United States, or if he seeks to acquire lawful permanent residence of the United States he is also removable and excludable under INA §212(A)(2)(a)(i)(II), 8 USC §1227(a)(2)(A)(i)(II)

(controlled substances.)[1] These sections of law are broadly construed to include any state conviction for controlled substances or drug related crimes.

Mr. Vezina Can Show He Has Been Prejudiced Based on His Guilty Plea To Cocaine Trafficking

8. In the instant case, therefore, it is clear that Mr. Vezina has been prejudiced by his conviction in 1998, in the State of Florida, to possession of cocaine. The following facts clearly demonstrate Mr. Vezina's prejudice, which result from his guilty plea: (A) the Immigration and Nationality Act (INA) makes Mr. Vezina statutorily removable and/or inadmissible because of his possession of cocaine conviction; (B) he is subject to deportation and removal because he is removable or deportable under INA §§237(a)(2)(B)(i) (controlled substance violator), 8 USC §1227(a)(2)(A)(B)(i); (C) he is permanently inadmissible and subject to removal from the United States if he attempts to renter the United States after travelling abroad, or seeks adjustment of status, under the INA §212(a)(2)(A)(i)(II), 8 USC §1182(a)(2)(A)(i)(II), because he has been convicted of a crime relating to a controlled substance violation; and (D) his conviction was the

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[1] If Mr. Vezina travels outside of the United States, and seeks to return, he can also be detained without bond and be removed solely because of his criminal conviction.

sole basis for the legacy INS to deny his adjustment of status application.

9. Solely as a result of Mr. Vezina's convictions, therefore, he is subject to deportation, inadmissibility, and removal from the United States without the possibility to apply for any relief. Mr. Vezina is removable from the United States, and will be permanently barred from reentering the United States, solely based on his possession of cocaine conviction, which is a clear and unequivocal showing of prejudice. Absent relief from this Court, Mr. Vezina will be removed or deported from the United States, prevented from obtaining lawful permanent residence, and permanently barred from reentering the United States.

FURTHER AFFIANT SAYETH NOT

/s/ Ira J. Kurzban
Ira J. Kurzban, Esq.

Sworn and subscribed before me this 9th day of December, 2008.

/s/ Zarayda N. Heathercote
NOTARY PUBLIC

[SEAL] MY PUBLIC STATE OF NOTARY
Zarayda N. Heathercote
Commission # DD680528
Expires: JULY 21, 2011
Bonded Thru Atlantic Bonding Co., Inc.

IN THE CIRCUIT COURT
FOR OSCEOLA COUNTY,
FLORIDA
CRIMINAL DIVISION

CASE NUMBER CR 97-1899B

STATE OF FLORIDA

– vs. –

RICHARD JOSEPH VEZINA

PLEA

1. I, the above-named defendant, hereby withdraw my plea(s) of Not Guilty, and enter the following plea(s) of ( ) Guilty (✓) Nolo Contendere to Possession of cocaine a 3rd degree felony/misdemeanor with a maximum penalty of 5 years ( ) Guilty (✓) Nolo Contendere to _____ a ___ degree felony/misdemeanor with a maximum penalty of _____

2. I understand the following paragraphs concerning my trial rights:

a. that if the Court accepts my plea(s), I give up my right to a trial, at which I would have had the following rights:

(i) to have a jury determine whether I am guilty or not guilty;

(ii) to see and hear the witnesses testify, and to have my lawyer question them for me;

(iii) to subpoena & present witnesses & items of evidence in my defense, & to present any defense I might have to the jury;

(iv) to testify or to remain silent; and

(v) to require the prosecutor to prove my guilty by admissible evidence beyond any reasonable doubt before I can be found guilty by the jury.

b. that I give up my right to appeal all matters except the legality of my sentence or the Court's authority to hear this case. My lawyer has explained to me what an appeal is.

c. that a plea of Not Guilty denies that I committed the crime(s); & Plea of Guilty admits that I did commit the crime(s); and a Plea of Nolo Contendere (No Contest) says that I do not contest the evidence against me. I understand that if the Court accepts my plea(s) there will be NO TRIAL and the Court will impose sentence(s) based upon my plea(s).

d. that I have read the information/ indictment on this case and I understand the charge(s) to which I enter my plea(s). My lawyer has explained to me the maximum penalty for the charge(s), the essential elements of the crime(s) and possible defenses to the crime(s), and I understand these things. I understand that I am on parole, my parole can be revoked and I can returned to prison to complete that sentence; and if I am on probation on another case my probation can be revoked and I can receive a separate

sentence up to the maximum on the probation charge in addition to the sentence imposed on this case.

3. Neither my lawyer nor anyone else has told me or promised me that the Judge would give me a particular sentence, nor has my lawyer or anyone else told me or promised me anything to get me to enter my plea(s) except as set forth below or said in open Court:

a. ( ) No promises have been made by my lawyer or anyone else.

b. ( ) The prosecutor has agreed to 18 months drug offender probation. Fine not to exceed 500.00 & costs, adjudification [sic] up to judge.

c. ( ) The Judge has agreed to _____ sentence will be determined based on certain factors. The Judge can go above this presumptive sentence and impose up to the maximum for each count as listed above by stating clear and convincing reasons. If the Judge goes above this presumptive sentence, I will have the right to appeal my sentence. I also understand that if my plea is to a misdemeanor, that the Sentencing Guidelines do not apply and that the Judge can sentence me up to the maximum for each misdemeanor count listed above.

5. I understand that if the Judge places me on probation at my sentencing, and at a later time, the probation is revoked by the Judge (after a violation of probation hearing or my admission to the violations),

the Judge can then sentence me to the maximum penalty for the charge(s) listed above.

6. I understand and agree that if the Judge permits me to stay out of jail pending sentencing I must notify my lawyer and bondsman or pre-trial release officer of any change in my address or phone number, and if the Judge orders a Pre-Sentence Investigation (PSI) and I willfully fail to appear for an appointment with the probation officer for the PSI interview, the Judge can place me in jail for the PSI interview, or until my sentencing.

7. My education consists of 3 years college. I am not under the influence of any drug, medication or alcohol at the time I sign this plea. I am not suffering from any mental problems at this time which affect my understanding of this plea.

8. Neither my lawyer nor anyone else has pressured or forced me to enter my plea and I am entering my plea voluntarily of my own free will and because

( ) I believe that I am guilty

(✓) I believe it is in my own best interest.

9. I have read every word in this written plea. I have discussed this written plea with my lawyer and I fully understand everything contained in it. I have discussed the maximum penalties for my plea, the sentencing guidelines and I fully understand them. I have told my lawyer everything I know about this case and these charges. I am fully satisfied with the

way my lawyer has handled my case for me and have no complaints.

SWORN TO AND FILED in Open Court in the presence of defense counsel and the Judge this 20th day of February, 1998.

Mel Wills, Jr., Clerk of Courts

By: _____
Deputy Clerk in Attendance

Defendant's Signature: Richard Vezina

Address & Phone: 1014 S.E. 12th Ave.
Deerfield Beach Fla. 33441 (954) 480-8215

CERTIFICATE OF DEFENSE COUNSEL

I, Defendant's Counsel of Record, certify that: I have discussed this case with the defendant, including his/her trial rights, the nature of the charge(s), essential elements of each, the evidence against him/her of which I am aware, the possible defenses he/she has, the maximum penalty for the charge(s) the sentencing guidelines, and his/her right to appeal. No promises have been made to the defendant other than as set forth in this form or on the record. I believe he/she full understands this written plea, the consequences of entering it, and that the defendant does so of his/her own free will.

Counsel for the Defendant: /s/ Steven Jablon

CERTIFICATE OF PROSECUTOR

( ) I consent to the plea(s) to the lesser charge(s).

( ) I confirm the promises in 3(b) have been made.

Assistant State Attorney: /s/ Helen Heim

IN THE CIRCUIT COURT OF
OSCEOLA COUNTY, STATE OF FLORIDA

THE STATE OF FLORIDA	INFORMATION # C97-1899B
VS.	*FASTRACK CMP*
RICHARD JOSEPH VEZINA	1. POSSESSION OF COCAINE (F3-L3)

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

LAWSON LAMAR, State Attorney of the Ninth Judicial Circuit prosecuting for the State of Florida in Osceola County, OR LAWSON LAMAR, State Attorney for the Ninth Judicial Circuit prosecuting for the State of Florida in Osceola County, by and through the undersigned Designated Assistant State Attorney, under oath, CHARGES that RICHARD JOSEPH VEZINA, on the 14th day of September, 1997, in said County and State, did, in violation of Florida Statute 893.13(6)(a), actually or constructively possess Cocaine, a substance controlled by Florida Statute 893.03(2)(a)(4).

This information encompasses the transaction and all charges listed on Complaint Number CR97-1899 and the bond thereon is hereby superseded. The Osceola County Sheriff's Office shall substitute the charge(s) and bond indicated on the information for those on the above cited complaint.

By /s/ E A Cranford
Evelyn Cranford
Designated Assistant State
Attorney
Florida Bar No. 797553
Bond $1,000.00 EC/EC
S.T. 03/0798

STATE OF FLORIDA
COUNTY OF ORANGE

Personally appeared before me Evelyn Cranford Assistant State Attorney of the Ninth Judicial Circuit of Florida, who being first duly sworn, says that he/she has received testimony under oath from the material witness or witnesses, which if true, would constitute the offense herein, and that he/she institutes this prosecution in good faith.

The foregoing instrument was acknowledged before me this 23 day of September, 1997 by the aforementioned Assistant State Attorney who is personally known to me and who did take said oath.

/s/ Carolyn A. Irving

[SEAL]

CAROLYN A. IRVING
MY COMMISSION
CC 404394
EXPIRES: September 7, 1998
Bonded Thru Notary Public
Underwriters

Supreme Court, U.S.
FILED
MAR 19 2010
OFFICE OF THE CLERK

No. 09-628

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD VEZINA, *Petitioner*,

v.

STATE OF FLORIDA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

BILL McCOLLUM
ATTORNEY GENERAL OF FLORIDA

WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL
Florida Bar Number 773026
444 Seabreeze Blvd., Fifth Floor
Daytona Beach, FL 32118
(386) 238-4990 /// FAX (386) 238-4997
wesley.heidt@myfloridalegal.com

COUNSEL FOR RESPONDENT

QUESTION PRESENTED

Petitioner frames the following question to this Court:

Should the U.S. Supreme Court grant certiorari or otherwise hold this case in abeyance pending the Court's decision in Padilla v. Kentucky, No. 08-651, cert. granted, 129 S. Ct. 1317 (Feb. 23, 2009), oral argument held Oct. 13, 2009, which raises an issue substantially identical to that presented here, i.e., if a criminal defense attorney falsely advises a non-citizen client that his plea of guilty will not result in deportation, can that misadvise constitute ineffective assistance of counsel under the Sixth Amendment?

Respondent restates this question as:

Whether this Court should exercise its jurisdiction to review a state court decision when the certiorari petition was untimely filed with this Court, when the issue was untimely presented to the state courts, and when it is a factually different issue than that found in Padilla.

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No. 09-628

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD VEZINA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Respondent, the State of Florida, respectfully asks this Court to deny the petition for writ of certiorari seeking review of the opinion of the Supreme Court of Florida.

OPINIONS BELOW

The plea hearing at issue is included as Appendix A (A). The postconviction motion is included as Appendix B (B), the State of Florida's response is included as Appendix C (C), the trial court order denying the motion is Appendix D (D), Petitioner's motion for rehearing is Appendix E (E), the State response to that motion is Appendix F (F), and the order denying the motion for rehearing is Appendix G (G). The *per curiam* decision of the Fifth District Court of Appeal of Florida, Vezina v. State, 12 So.3d 237, 2009 WL 2152544 (Fla. 5th DCA, June 23, 2009), (Table, Text in WESTLAW), Unpublished Disposition, is included as Appendix H (H). The petition for certiorari in the Florida Supreme Court is Appendix I (I), and the order of the Florida Supreme Court dismissing the petition for writ of certiorari, Vezina v. State, 17 So.3d 1226, 2009 WL 2620068 (Fla., August 26, 2009), (Table, Text in WESTLAW), Unpublished Disposition, is included as Appendix J (J).

JURISDICTION

Petitioner seeks review under 28 U.S.C. § 1257. However, pursuant to the Rules of the Supreme Court of the United States, Rule 10, Petitioner cannot invoke jurisdiction as a matter of right. Given that the instant petition was untimely filed, given that the issue was presented to the trial court in an untimely postconviction motion, and given that the issue is factually

distinguishable from that of Padilla which is pending before this Court, Petitioner has failed to show a compelling reason for Florida's decision to be reviewed, and this Court should not exercise jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner is seeking review under the Sixth and the Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE AND FACTS

On February 20, 1998, Petitioner entered a best interest guilty plea for possession of cocaine in exchange for eighteen months of probation. (A). Specifically, the following plea colloquy occurred:

> THE COURT: All right. Well, you're here today charged with the criminal offense of possession of cocaine. It's a crime punishable by up to five years in prison. You have all the rights that – if, have you been here a while this morning, you've heard me say probably six or seven times so far, but I'm going to go over them with you.
>
> You have the right to a jury trial, at which the State would have to prove the case against you beyond and to the exclusion of every reasonable doubt. You don't have to do anything or say anything. It's up to the

State to prove the case against you.

You are represented by an attorney. And you do have a very experienced lawyer representing you. If you couldn't afford to hire a lawyer then I would appoint a lawyer to represent you.

You don't have to do anything or say anything. It's the obligation of the State to prove the case against you to a unanimous jury verdict beyond a reasonable doubt.

Sir, I'm showing you the form we call a plea form. Sir, do you recognize it?

THE DEFENDANT: Yes, sir.

THE COURT: Did you read it?

THE DEFENDANT: Yes, sir.

THE COURT: Did you sign it?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand it?

THE DEFENDANT: Yes, sir.

THE COURT: How far did you go to school?

THE DEFENDANT: Three years in college.

THE COURT: Okay. I have to tell you that if you're not a citizen of the United States, this plea could be used to deport you. If you're on probation, this plea could be used to violate your probation.

Is it your desire, sir, to give up your rights contained in this plea form and enter your plea today of no contest to possession of cocaine?

THE DEFENDANT: Yes, your Honor.

THE COURT: Has anybody promised you anything other than what you have heard me say to get you to plead?

THE DEFENDANT: No.

(A 3-5).

Petitioner completed his eighteen months of probation; however, on October 23, 2008, over ten years after his plea, he filed through counsel a motion to set aside the plea and vacate sentence. (B). In that motion, Petitioner submitted that before accepting any plea a trial court should advise a defendant of the possibility of deportation. (B). He, then, admitted the court warned him that his plea could be used to deport him; however, he alleged that the court did not determine if he understood

the court's warning. (B 2). Petitioner goes further and asserted that his attorney affirmatively advised him that his plea would not expose him to deportation. Petitioner cited Florida v. Green, 944 So. 2d 208, 209 (Fla. 2006), noted that it was decided on October 25, 2006, and asserted that Green gave him two years to file the motion in state court.

The State of Florida filed a Response which made several arguments. (C). First, it noted that Petitioner had been informed that the plea could be used to deport him. (C 2). The Response also pointed out that Petitioner had specifically stated that no one had promised him anything different than that set out in the plea agreement and as explained during the plea colloquy. (C 2). Additionally, the prosecutor noted that Petitioner's claim was not that he was being deported but that the conviction acted to deny him permanent, lawful residence. (C 3). Given this fact, the State asserted that the motion was legally insufficient under Florida law as set out in Green.

On December 16, 2008, the trial court entered an order denying the motion. (D). Petitioner filed a motion for rehearing (E) asserting that Green had no application to his case; instead, his claim was one of ineffective assistance of trial counsel citing Rensoli v. Florida, 718 So. 2d 1278 (Fla. 3d DCA 1998), in support. Additionally, Petitioner submitted that his assertion was not just that of possible deportation but also of other deportation consequences. The State filed a Response (F) noting that when the trial court had specifically asked whether

anyone had made any other promises to encourage Petitioner to plea Petitioner had said under oath there had not been.

The trial court denied the rehearing motion, and Petitioner appealed to the district court of appeal. Without ordering a response from the State, the appellate court *per curiam* affirmed the trial court in a decision issued on June 23, 2009. (H). Mandate issued from the appellate court on July 17, 2009.

Petitioner next filed a petition for writ of certiorari in the Florida Supreme Court on August 21, 2009. (I). On August 26, 2009, the Supreme Court of Florida dismissed the writ specifically noting that it was without jurisdiction. (J).

Most recently, on November 24, 2009, Petitioner filed the instant writ of certiorari requesting this Court accept jurisdiction. The State of Florida's response follows.

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD NOT ACCEPT JURISDICTION BECAUSE THE PETITION WAS UNTIMELY FILED WITH THIS COURT, THE ISSUE WAS UNTIMELY FILED IN THE STATE COURTS, AND IT IS FACTUALLY DISTINGUISHABLE FROM PADILLA.

Petitioner submits that the issue in this case is the same as the one addressed by this Court in Padilla v. Kentucky, no. 08-651, cert. granted, 129 S. Ct. 1317 (Feb. 23, 2009). Respondent asserts that this Court should not accept jurisdiction for three reasons: the petition is untimely filed, the issue was untimely pled to the state courts, and the instant case is factually distinguishable with Padilla.

First, as to the timeliness of the petition, this Court has held as follows:

> The law states that the "time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by the rules of the Supreme Court." 28 U.S.C. § 2101(d). Those Rules provide that "[a] petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort ... shall be deemed in time when it is filed with the Clerk of

> this Court within 90 days after the entry of judgment," Rule 13.1. This period may be extended by a Justice of this Court "for good cause shown" for a period not to exceed 60 days, Rule 13.2, but an application for such an extension "is not favored," Rule 13.6.

Madden v. Texas, 498 U.S. 1301 (1991). Florida law provides that in an appeal from the state appellate court's affirmance of a conviction, a *per curiam* affirmance is not reviewable by the Florida Supreme Court. See Jenkins v. Florida, 385 So. 2d 1356, 1359 (Fla. 1980); see also Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 107 S.Ct. 1046, 1048 n. 4, 94 L.Ed.2d 190 (1987) (acknowledging "[u]nder Florida law, a *per curiam* affirmance issued without opinion cannot be appealed to the State Supreme Court" such that the petitioner sought review directly in the Supreme Court).

Petitioner's appeal to the district court of appeal was *per curiam* affirmed on June 23, 2009. (H). Ninety days from that date would be September 21, 2009. The instant petition was not filed until November 24, 2009. The attempt to seek certiorari of the *per curiam* affirmance clearly was in violation of Florida law; hence, the Supreme Court of Florida dismissed the writ. (J). Furthermore, throughout this process, Petitioner has been represented by counsel. In Florida case law clearly set out almost thirty years ago that the Supreme Court of Florida had no jurisdiction over *per curiam* affirmances. Jenkins, 385 So. 2d at 359 ("Accordingly, we hold that

from and after April 1, 1980, the Supreme Court of Florida lacks jurisdiction to review *per curiam* decisions of the several district courts of appeal of this state rendered without opinion, regardless of whether they are accompanied by a dissenting or concurring opinion, when the basis for such review is an alleged conflict of that decision with a decision of another district court of appeal or of the Supreme Court. The application for review in the instant case having been filed subsequent to March 31, 1980, it is therefore dismissed.") Petitioner's improper attempt to seek review in the Supreme Court of Florida should not toll Petitioner's ninety (90) day period. Therefore, his petition before this Court would be over two months late.

Secondly, Petitioner's attempt to seek review in the Supreme Court of Florida was untimely filed. The decision of the district court of appeal was issued on June 23, 2009. (H). By Florida Rule of Appellate Procedure 9.120(b), Petitioner had thirty (30) days to file a notice to invoke the jurisdiction of the Supreme Court of Florida. So, Petitioner had until July 23, 2009; however, he did not file the improper writ until August 21, 2009, nearly a month, late.

Thirdly, the motion filed in the state trial court was filed over ten years after his plea. Florida clearly has a two year limit for raising ineffective assistance claims under Florida Rule of Criminal Procedure 3.850. While there are exceptions to that time limitation, Petitioner does not fall into them. Petitioner's attempt to justify his late motion was to argue that the two year period did not

begin to run until the defendant first learned of the threat of deportation. (B 10). What Petitioner was trying to do was shoehorn himself into the limited exception Florida created in Peart v. Florida, 756 So. 2d 42 (Fla. 2000) (determining that the two-year limitation period for raising a claim of failure by the court to advise a defendant of deportation consequences of a plea does not begin to run until the defendant knows or should know of the threat of deportation, because that is when the defendant first could articulate a prima facie case), receded from in Florida v. Green, 944 So. 2d 208 (Fla. 2006). In fact, Petitioner specifically referenced Green in his motion. The reason his situation was not controlled by Peart/Green was that Petitioner was specifically advised, "[i]f you're not a citizen of the United States, this plea could be used to deport you...." (A 5). Given that it was not within the limited exception created in Peart, Petitioner's motion in state court would be untimely filed.

Even if timely filed in this Court and in the Florida courts, this case is still distinguishable from Padilla. First, Padilla pled and was sentenced on October 4, 2002, and filed his post-conviction motion in August of 2004 which was within the three year period set out under Kentucky's procedural rules. See Kentucky Rule of Criminal Procedure 11.42. Therefore, unlike Petitioner, Padilla's motion was timely filed.

More importantly, it does not appear Padilla was ever informed by the court that he faced possible deportation consequences. Kentucky v. Padilla, 253

S.W.3d 482 (Ky. 2008). As noted above, Petitioner was specifically told during his plea colloquy that his plea could lead to him being deported. This point is not disputed by Petitioner; instead, he simply alleges that his attorney advised him differently.

Furthermore, Petitioner was asked if he had been promised anything differently than that told to him by the court. Petitioner informed the trial court under oath that he had not. Case law consistently has held that representations by a defendant during a plea hearing should carry great weight - "[T]he representations of the defendant [at the plea hearing], as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity." Blackledge v. Allison, 431 U.S. 63, 73-74 (1977); see also Leroux v. Florida, 689 So. 2d 235, 238 (Fla. 1996) (Supreme Court of Florida noted that possible attorney misadvise would be cured by the trial court addressing the issue during plea colloquy.); Stano v. Florida, 520 So. 2d 278, 280 (Fla. 1988) (Supreme Court of Florida favorably cited the trial court's order which held "Once the Defendant enters a plea of guilty before this Court, and assures the Court under oath that the plea is voluntary, the Court will not go behind the plea. The plea cuts off inquiry into all that precedes it. The Defendant is barred from contesting events happening before the plea."). This, too, appears to differ from the facts in Padilla.

Finally, Petitioner attempts to redefine and expand

the term "deportation." In his motion for rehearing filed in the state court, he basically admitted that there was no imminent threat of deportation. (E 8-9). Instead, the threat to Petitioner is that he is allegedly barred from obtaining permanent resident status. (E 8-9). This just highlights the problem in this area. Petitioner's claim is even more tangentially collateral than that in Padilla. It is not that he is being threatened with deportation; instead, he cannot become a permanent resident. Petitioner's argument would require criminal attorneys not only to be immigration experts for matters at the time of the plea but to also predict indefinitely all future immigration law. Petitioner's plea was over twelve years ago.

Respondent respectfully submits that this type of claim is exactly what the trial court was trying to prevent when it informed Petitioner of possible deportation and why the court asked if other promises or statements had been made to him. Clearly, Petitioner has failed to show why this Court should accept this case given that the petition was untimely filed with this Court, the issue was untimely presented to the state courts, and it is so completely, factually distinguishable from Padilla.

CONCLUSION

For these reasons, Respondent respectfully asks this Court to deny the petition for writ of certiorari.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL
Fla. Bar #773026
444 Seabreeze Blvd.
Fifth Floor
Daytona Beach, FL 32118
(386) 238-4990
FAX (386) 238-4997
wesley.heidt@myfloridalegal.com

COUNSEL FOR RESPONDENT

No. 09-628

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD VEZINA, *Petitioner*,

v.

STATE OF FLORIDA, *Respondent*.

APPENDIX
TO
RESPONDENT'S BRIEF IN OPPOSITION

BILL McCOLLUM
ATTORNEY GENERAL OF FLORIDA

WESLEY HEIDT
ASSISTANT ATTORNEY GENERAL
Florida Bar Number 773026
444 Seabreeze Blvd., Fifth Floor
Daytona Beach, FL 32118
(386)238-4990 /// FAX (386) 238-4997
wesley.heidt@myfloridalegal.com

COUNSEL FOR RESPONDENT

No. 09-628

IN THE
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RICHARD VEZINA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR OSCEOLA COUNTY, FLORIDA

CASE NO. CR97-1899

STATE OF FLORIDA,

PLAINTIFF,

-VS-

RICHARD JOSEPH VEZINA,

DEFENDANT.

_____/

TRANSCRIPT OF PLEA AND SENTENCING TAKEN ON FEBRUARY 20, 1998, AT THE OSCEOLA COUNTY COURTHOUSE, KISSIMMEE, FLORIDA, BEFORE THE HONORABLE ANTHONY H. JOHNSON, CIRCUIT COURT JUDGE.

APPEARANCES:

HELEN HEIM, ASSISTANT STATE ATTORNEY, 20 S. ROSE AVENUE, SUITE 2, KISSIMMEE; FLORIDA 34741; ON BEHALF OF THE STATE OF FLORIDA.

STEVEN JABLON, ESQ., 808 HASTINGS DRIVE, KISSIMMEE, FLORIDA 34771; ON BEHALF OF THE DEFENDANT.

OFFICIAL COURT REPORTERS
OSCEOLA COUNTY COURTHOUSE
KISSIMMEE, FLORIDA

PROCEEDINGS

THE COURT: OKAY. MR. JABLON, I THINK YOU'RE NEXT. THIS IS MR. RICHARD VEZINA, IS IT?

MADAM CLERK, WOULD YOU SWEAR THE DEFENDANT.

(THE DEFENDANT WAS DULY SWORN.)

THE COURT: OKAY. MR. JABLON, MR. VEZINA IS HERE CHARGED WITH POSSESSION OF COCAINE. AND HOW WOULD HE LIKE TO PROCEED?

MR. JABLON: AT THIS TIME, YOUR HONOR, PURSUANT TO NEGOTIATIONS WITH THE STATE ATTORNEYS OFFICE, MR. VEZINA IS GOING TO BE ENTERING A BEST INTEREST GUILTY PLEA TO THE CHARGE OF POSSESSION OF COCAINE, WITH THE FOLLOWING UNDERSTANDING. HE WILL BE PLACED ON 18 MONTHS DRUG OFFENDER PROBATION, FINE NOT TO EXCEED $500, PLUS COSTS. ADJUDICATION OF GUILT WILL BE LEFT UP TO YOU.

THE COURT: WELL, I HAVE HIS RECORD HERE. I DON'T THINK WE NEED TO TALK ABOUT THAT FOR A LONG TIME, ALTHOUGH MOST OF THIS SEEMS TO BE TRAFFIC.

MR. JABLON: YES. HE HAS ONE PRIOR FOR PURCHASE–

THE COURT: PURCHASE OF COCAINE.

MR. JABLON: --OF COCAINE IN '89, I BELIEVE.

THE COURT: THAT WILL PRETTY MUCH DO IT AS FAR AS ADJUDICATION GOES.
TELL ME YOUR NAME, SIR.

THE DEFENDANT: MY NAME IS RICHARD VEZINA.

THE COURT: WHERE DO YOU LIVE?

THE DEFENDANT: I LIVE IN DEERFIELD BEACH, FLORIDA.

THE COURT: ALL RIGHT. WELL, YOU'RE HERE TODAY CHARGED WITH THE CRIMINAL OFFENSE OF POSSESSION OF COCAINE. IT'S A CRIME PUNISHABLE BY UP TO FIVE YEARS IN PRISON. YOU HAVE ALL THE RIGHTS THAT -- IF HAVE YOU BEEN HERE A WHILE THIS

MORNING, YOU'VE HEARD ME SAY PROBABLY SIX OR SEVEN TIMES SO FAR, BUT I'M GOING TO GO OVER THEM WITH YOU.

YOU HAVE THE RIGHT TO A JURY TRIAL, AT WHICH THE STATE WOULD HAVE TO PROVE THE CASE AGAINST YOU BEYOND AND TO THE EXCLUSION OF EVERY REASONABLE DOUBT. YOU DON'T HAVE TO DO ANYTHING OR SAY ANYTHING. IT'S UP TO THE STATE TO PROVE THE CASE AGAINST YOU.

YOU ARE REPRESENTED BY AN ATTORNEY. AND YOU DO HAVE A VERY EXPERIENCED LAWYER REPRESENTING YOU. IF YOU COULDN'T AFFORD TO HIRE A LAWYER, THEN I WOULD APPOINT A LAWYER TO REPRESENT YOU.

YOU DON'T HAVE TO DO ANYTHING OR SAY ANYTHING. IT'S THE OBLIGATION OF THE STATE TO PROVE THE CASE AGAINST YOU TO A UNANIMOUS JURY VERDICT BEYOND A REASONABLE DOUBT.

SIR, I'M SHOWING YOU THE FORM WE CALL A PLEA FORM. SIR, DO YOU RECOGNIZE IT?

THE DEFENDANT: YES, SIR.

THE COURT: DID YOU READ IT?

THE DEFENDANT: YES, SIR.

THE COURT: DID YOU SIGN IT?

THE DEFENDANT: YES, SIR.

THE COURT: DO YOU UNDERSTAND IT?

THE DEFENDANT: YES, SIR.

THE COURT: HOW FAR DID YOU GO TO SCHOOL?

THE DEFENDANT: THREE YEARS IN COLLEGE.

THE COURT: OKAY. I HAVE TO TELL YOU THAT IF YOU'RE NOT A CITIZEN OF THE UNITED STATES, THIS PLEA COULD BE USED TO DEPORT YOU. IF YOU'RE ON PROBATION, THIS PLEA COULD BE USED TO VIOLATE YOUR PROBATION.

IS IT YOUR DESIRE, SIR, TO GIVE UP YOUR RIGHTS
CONTAINED IN THIS PLEA FORM AND ENTER YOUR PLEA TODAY OF NO CONTEST TO POSSESSION OF COCAINE?

THE DEFENDANT: YES, YOUR HONOR.

THE COURT: HAS ANYBODY PROMISED

YOU ANYTHING OTHER THAN WHAT YOU HAVE HEARD ME SAY TO GET YOU TO PLEAD?

MR. JABLON: HAVE THERE BEEN ANY OTHER PROMISES GIVEN YOU TO OTHER THAN WHAT'S IN THAT PLEA FORM?

THE DEFENDANT: NO.

THE COURT: STATE, FACTUAL BASIS, PLEASE.

MS. HEIM: YES, YOUR HONOR. ON THE DATE ALLEGED IN THE INFORMATION IN OSCEOLA COUNTY, FLORIDA, MR. RICHARD JOSEPH VEZINA WAS FOUND TO BE IN POSSESSION OF A SUBSTANCE LATER IDENTIFIED AS COCAINE.

THE COURT: OKAY. I DO FIND A FACTUAL BASIS FOR THE ACCEPTANCE OF HIS PLEA. RATHER UNUSUAL FACT PATTERN HERE. BUT I'M GOING TO GO ALONG WITH THE AGREEMENT REACHED BETWEEN YOURSELF THROUGH YOUR LAWYER AND THE STATE OF FLORIDA.

I WILL ADJUDICATE YOU GUILTY OF THE OFFENSE. BUT YOU ALREADY HAVE A FELONY CONVICTION, SO THIS IS NOT GOING TO BE – OR A FELONY POSSESSION OF COCAINE. YOU WERE CONVICTED IN 1989 IN POMPANO BEACH OF THE SAME OFFENSE.

I'M GOING TO PUT YOU ON 18 MONTHS OF DRUG OFFENDER PROBATION, REQUIRE THAT -- YOUR FINE WILL BE $258.

IN A POSSESSION CASE AM I REQUIRED TO IMPOSE THE $250 AND $100 DRUG TRUST FUND ASSESSMENTS, MADAM PROSECUTOR, OR WHICHEVER OF YOU WOULD -- DRUG TRUST FUND ASSESSMENTS IN A POSSESSION CASE, ARE THEY REQUIRED?

MS. HEIM: IT WAS PART OF THE WRITTEN PLEA OFFER, YOUR HONOR.

MR. JABLON: IT WAS.

THE COURT: THEN $250 OSCEOLA COUNTY DRUG TRUST FUND AND $100 F.D.L.E. DRUG TRUST FUND, $258 FINE. SO THAT'S ACTUALLY GOING TO COME OUT TO A FEW DOLLARS MORE THAN THE $500 WE HAD SPOKEN OF.

MS. HEIM: YOUR HONOR, THAT $500 IS IN ADDITION TO THE REGULAR COSTS.

THE COURT: OKAY. SO IT'S A FINE OF $500 PLUS THE COSTS?

MS. HEIM: RIGHT, PLUS THE COSTS.

MR. JABLON: OUR AGREEMENT WITH

THE STATE IS THE STATE HAD AGREED TO UP THE FINE OF $500 TO PERMIT ME TO ARGUE FOR A WITHHOLD OF ADJUDICATION.

THE COURT: THAT'S AN INTERESTING – THAT'S A NOVEL CONCEPT, BUT WHATEVER.

OKAY. THE FINE WILL BE $500; $250 OSCEOLA COUNTY DRUG TRUST FUND; $100 F.D.L.E. DRUG TRUST FUND; 18 MONTHS DRUG OFFENDER PROBATION, WITH THE REQUIREMENT THAT YOU BE EVALUATED FOR DRUG OFFENDER COUNSELING AND YOU UNDERGO WHATEVER COUNSELING IS RECOMMENDED FOR YOU; THAT YOU SUBMIT TO RANDOM URINALYSIS TESTS.

I HAVE TO TELL YOU THIS, SIR. WELL, TO YOUR CREDIT, I DON'T SEE HERE THAT YOU HAVE BEEN BREAKING INTO PEOPLE'S HOUSES OR DOING ANYTHING THAT I REGARD AS A REAL SERIOUS OFFENSE. BUT IF YOU HAVE A DIRTY URINE TEST, YOU WILL BE VIOLATING YOUR PROBATION. AND MR. JABLON WILL TELL YOU I DON'T MESS AROUND WITH THAT PRETTY MUCH. A LOT OF JUDGES IF YOU VIOLATE YOUR PROBATION, THEY WILL PUT YOU BACK ON PROBATION. IF YOU VIOLATE AGAIN, THEY PUT YOU BACK. AND I DON'T DO THAT. AND I'M JUST TELLING YOU NOW SO YOU WILL HAVE'A FAIR WARNING.

OKAY. I DON'T THINK THERE'S ANYTHING ELSE THAT WE NEED TO ADDRESS IN THIS CASE.

SIR, YOU HAVE 30 DAYS WITH WHICH TO APPEAL THE JUDGMENT AND SENTENCE OF THE COURT. GOOD LUCK TO YOU.

PLEASE STEP TO YOUR RIGHT AND DEPUTY GONZALEZ WOULD L I K E T O TAKE YOUR FINGERPRINTS.

THANK YOU, MR. JABLON, FOR BEING HERE TODAY, SIR.

MR. JABLON: NO PROBLEM.

CERTIFICATE OF REPORTER

I, JERI K. CRUSE, REGISTERED PROFESSIONAL REPORTER, CERTIFY THAT I WAS AUTHORIZED AND DID TRANSCRIBE THE STENOGRAPHIC NOTES OF STEPHEN W. FRANKLIN AND THAT THE FOREGOING IS A CORRECT TRANSCRIPT OF THE PROCEEDINGS.

DATED THIS 2ND DAY OF JULY 2007.

/S/

JERI K. CRUSE, RPR

OFFICIAL COURT REPORTERS
OSCEOLA COUNTY COURTHOUSE
KISSIMMEE, FLORIDA

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR OSCEOLA COUNTY, FLORIDA
CRIMINAL JUSTICE DIVISION

CASE NO. 49-97-CF-1899

STATE OF FLORIDA,

Plaintiff,

v. Honorable Scott Polodna

RICHARD VEZINA,

Defendant.
_____/

DEFENDANT'S MOTION TO SET ASIDE PLEA AND VACATE SENTENCE

COMES NOW the Defendant, **RICHARD VEZINA**, by and through his undersigned attorney, and pursuant to FRCrP 3.850(a)(5), petitions this Honorable Court to enter its Order setting aside his Plea and vacating his sentence in the above styled cause and as grounds therefore would show:

FACTS

1. On February 20, 1998, the Defendant entered a Plea and was sentenced to probation for the offense of Possession of Cocaine. The Defendant

successfully completed his probationary sentence.

2. When the Defendant entered the Plea, there was no information with respect to the immigration consequences on the Plea form.

A copy of the transcript of the Plea and Sentencing is attached hereto and incorporated herein for all purposes as Exhibit "A".

3. As can be seen from the transcript, the trial judge made a fleeting reference to immigration consequences but did not fully inform the Defendant to comply with Rule 3.172(c)(8), which requires the Court to take the Plea and advise the Defendant in every case before the Plea of the possibility of deportation as a result of the conviction. The Court did not ask the Defendant if he understood that his plea could lead to deportation. The plea form contains no immigration warning. The judge, however, orally warned the Defendant: "I have to tell you that if you're not a citizen of the United States, this plea could be used to deport you." (T 4:8-10). The court in taking the plea must advise the defendant, in every case before plea, of the possibility of deportation as a result of the conviction. The court must go further and ask the defendant whether he *understands* this warning. This, the court failed to do.

4. At all times while this matter was pending and pursuant to reviewing the Plea form with his trial attorney, the Defendant's attorney

informed him that this Plea would not result in any immigration consequences.

5. The Defendant has now learned that the entry of the plea in this cause has denied him lawful permanent residence, nor can he obtain U. S. Citizenship. Further, as of October 26, 2006, the Defendant learned that he could be subject to deportation.

6. In September, 2007, the Defendant met with an attorney and was advised that the time for the filing of the motion for post conviction relief, pursuant to Rule 3.850 did not end until two years after the Defendant "obtained knowledge" of the consequences.

7. This situation involved affirmative misadvice by the Defendant's counsel, thus it is not subject to a Strickland standard for review.

8. The Defendant is a citizen of Canada who has lived in the United States for more than 22 years. He has been married to a United States citizen since 1996, and wants to become a lawful permanent resident of the United States.

9. In order to obtain lawful permanent resident status, the Defendant needs to vacate the 1998 conviction for possession of cocaine.

10. The Defendant was represented by Michael Entin, Esq., and Steve Jablon, Esq. The Defendant's counsel, Steven Jablon, Esq., who made the court appearance before this Honorable Court was aware the Defendant was not a U. S. Citizen. The Defendant specifically discussed the immigration consequences of the case with Mr. Entin who affirmatively advised the Defendant that the plea would not expose him to deportation.

11. The Defendant would not have entered a plea to this offense had he known the drug offense would subject him to deportation. This case arose out of an assault investigation. Assault is not a deportable offense, so long as a one year custody sentence is not imposed. The Defendant could have entered a plea to an assault charge instead of the possession charge, and thereby avoided deportation.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO SET ASIDE PLEA AND VACATE SENTENCE

The Defendant hereby files his Memorandum of Law in support of his Motion to Set Aside Plea and Vacate Sentence and states:

The proper method to obtain relief is by 3.850 motion. The two-year limitation period of rule 3.850

applies, and starts to run when the defendant has or should have had (whichever is earlier) knowledge of the threat of deportation based on the plea.

To make a sufficient allegation of violation of the rule, the defendant need not show that he probably would have been acquitted had he gone to trial, but only that he was prejudiced by the error. To show prejudice, the defendant must show that he did not know that the plea might result in deportation, that he was threatened with deportation as a result of the plea, and that had he known of the threat of deportation, he would not have entered the plea. Peart v. State, 756 So.2d 42 (Fla. 2000), reversing Peart v. State, 705 So.2d 1059 (Fla. 3d DCA 1998), approving Marriott v. State, 605 So.2d 985 (Fla. 4th DCA 1992).

In State v. Wiita, 744 So.2d 1232 (4th DCA 1999), the defendant pled in 1981 to lewd assault in return for a probationary sentence. He got 10 years probation. In 1988 he moved to withdraw his plea based on §943.043, the sexual offender reporting and publicity sections, and the court allowed him to withdraw his plea. Held: Court does not abuse discretion in allowing defendant to withdraw his plea. Where defendant pled to avoid publicity, and could not have known that years later a statute would be enacted that required posting his photo on the internet and notification to his children's school, the court properly finds a manifest injustice.

A claim that a plea was involuntary can be

raised in a 3.850 motion if the circumstances show that it could not have been raised on direct appeal following a motion to withdraw the plea. (See this case for discussion of when voluntariness can be raised in a 3.850 motion.) Dooley v. State, 789 So.2d 1082 (1st DCA 2001).

The fact that defendant affirmed in his plea colloquy that no promises were made to him does not conclusively rebut defendant's allegation in a 3.850 motion that counsel gave affirmative misadvice regarding the time he will serve. Rensoli v. State, 718 So.2d 1278 (3d DCA 1998).

Defendant is entitled to a hearing on his motion when he alleges counsel affirmatively told him that there could be no immigration consequences. Ghanavati v. State, 820 So.2d 989 (4th DCA 2002).

A plea is involuntary if induced by counsel's promises which are not fulfilled. Where counsel incorrectly told defendant he could obtain release from a life sentence, the plea may be involuntary. Ivey v. State, 775 So.2d 306 (2d DCA 1999).

When defendant alleges that he pled based on counsel's misadvice regarding the amount of actual time he would serve, the defendant need not also allege that he had viable defense or that he would have been acquitted or received a more favorable plea bargain.

The issue is not whether counsel was ineffective in some manner, but whether the plea was freely and intelligently entered. Because the issue is not one of ineffective assistance, the defendant need not show prejudice under Strickland.

(See this case for extensive analysis of post-conviction relief motions alleging misadvice concerning the amount of actual time a defendant will serve.) Brazeail v. State, 821 So.2d 364 (1st DCA 2002).

Affirmative misadvice regarding a collateral consequence of a plea is a sufficient basis to withdraw the plea. Designation as a sexual offender or sexual predator is a collateral consequence, and when counsel affirmatively tells defendant he will not be designated, the plea should be withdrawn. Gunn v. State, 841 So.2d 629 (2d DCA 2003).

Where defendant entered his pleas with the belief that he might escape PRR sentencing, and under subsequent interpretations of the PRR statute it became clear that PRR sentencing was mandatory, the defendant should be permitted to withdraw his plea. Johnson v. State, 834 So.2d 384 (2d DCA 2003).

A direct consequence is one that results in a definite, immediate, and largely automatic effect on the range of punishment.

While the applicability of the Act is not a direct consequence of the plea, because the consequence is so severe, the court is advised to inform defendant of that possibility.

Affirmative misadvice regarding collateral consequences will result in relief. Thus, where counsel told defendant that he would be released following his plea "almost immediately," and defendant is not released because the state filed for civil commitment, the defendant is entitled to a hearing on his motion. Watrous v. State, 793 So.2d 6 (2d DCA 2001).

Where, as here, defendant is erroneously informed by counsel that a collateral consequence of a plea will not apply to him, he is entitled to withdraw his plea.

Counsel told defendant that his picture would not be on the internet if he pled to lewd act. After the plea but before sentencing, he learned otherwise. Held: Court errs in refusing to allow the plea to be withdrawn. Graham v. State, 779 So.2d 604 (2d DCA 2001).

Failure to inform defendant of the immigration consequences of his plea requires that the plea be withdrawn in a 3.850 motion where defendant alleges he would not have pled had he known he would be deported. Benelhocine v. State, 787 So.2d 38 (2d DCA 2001).

Misadvice by counsel regarding the length of time defendant would actually serve is grounds for allowing a plea to be withdrawn. Alvarez v. State, 742 So.2d 849 (3d DCA 1999).

When defendant alleges that he pled based on misadvice of counsel and he seeks to withdraw his plea, due process requires an evidentiary hearing unless the record conclusively shows the defendant is entitled to no relief. Simeton v. State, 734 So.2d 446 (4th DCA 1999).

In State v. Green, 944 So.2d 208, 219 (October 25, 2006), the Florida Supreme Court imposed additional requirements on a defendant filing Rule 3.850 motions based on the court's failure to advise the defendant of the possibility of deportation as to allegations that must be included in the motion: "The motion must allege, in addition to the lack of a deportation warning, that the defendant would not have entered the plea if properly advised and that under current law the plea does render the defendant subject to being removed from the country at some point in the future." State v. Green, 944 So.2d 208, 219 (October 26, 2006). It held, however, "defendants whose cases are already final will have two years from the date of this opinion in which to file a motion comporting with the standards adopted today." *(Id.* at 219).

The two-year period does not begin to run until the defendant first learns of the threat of deportation. Dobi v. State, 780 So.2d 343 (Fla. DCA

2001)(in Peart v. State, 756 So.2d 42 (Fla. 2000), the state supreme court held a defendant who learned of the threat of deportation before April 13, 2000, when the Peart decision was filed, would have two years from that date to file a Rule 3.850 motion); Gray v. State, 774 So.2d 30 (Fla. DCA 2000)(two-year limit held applicable to claim court failed to inform defendant of possible deportation begins to run when defendant has or should have knowledge of the threat of deportation); Ayers v. State, 708 So.2d 318 (Fla. DCA 1998)(defendant entitled to relief in the interests of justice, through motion filed a few days late, where statute of conviction had been held unconstitutional).

The Affiant states that the factual allegations contained in this Motion are true and correct.

/S/
RICHARD VEZINA

STATE OF FLORIDA
COUNTY OF BROWARD

I HEREBY CERTIFY that on this day before me, an officer duly authorized in the State and County aforesaid tot take acknowledgments personally appeared, **RICHARD VEZINA**, to me known to be the person described in and who executed the foregoing instrument or produced Florida Drivers License as valid identification and he acknowledged before me that he executed same.

WITNESS my hand and seal in the State and County last aforesaid this 21st day of October 2008.

/S/
NOTARY PUBLIC
My Commission Expires:
02-08-2010
DIANE M. PERSTEN
Notary Public, State of Florida

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Facsimile to the Office of the State Attorney, No. 2 Courthouse, Suite 3500, Kissimmee, FL, 34741, this

22nd day of October, 2008.

/S/

CHRISTOPHER L. SMITH, ESQ.
390 North Orange Ave., Suite 2100
Orlando, FL 32801
TEL: 407-897-6888
FAX: 407-841-2889
Florida Bar No. 367461
Attorney for Defendant

IN THE CIRCUIT COURT OF THE NINTH
JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff

vs.

RICHARD VEZINA,

Defendant
_____/

CASE NO.
CR97-1899

DIVISION
11-A

STATE'S RESPONSE TO DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and in response to "Defendant's Motion to Set Aside Plea and Vacate Sentence" filed on October 23, 2007, pursuant to Fla.R.Crim.P. 3.850, states as follows:

DEFENDANT'S CLAIM

Defendant alleges that his guilty plea to Possession of Cocaine in February of 1998 was involuntary because — although at the time he was properly informed by the judge pursuant to Fla.R.Crim.P. 3.172(c) (8) that he could be deported as a result of his plea — his attorney, Steven Jablon, had promised/affirmatively misadvised him

that there would be no "immigration consequences" as a result of his plea.

STATE'S RESPONSE

The undersigned recently became aware of Defendant's motion and the fact that his counsel has already set an evidentiary hearing on his motion without the Court's previously requiring the State to file a written response to the motion in order to determine whether a hearing is actually required. In reviewing the motion and its attached transcript of Defendant's plea and sentencing hearing, the State believes the motion should be summarily denied.

Initially, as noted, the judge who accepted Defendant.'s guilty plea did in fact advise Defendant before accepting it that if he were not a U.S. citizen, his guilty plea could be used to deport him. This is all a judge is required to do under Fla.R.Crim.P. 3.172(c) (8), regardless of whether Defendant now believes the rule also requires that the judge must go further to make sure a defendant also understands the advice. (Of course, some things are nonetheless obvious: a review of the immediate context of this advice from the judge as well as a review of the entire transcript of the plea and sentencing hearing clearly shows that Defendant was undoubtedly understanding what was being said and was giving appropriate answers to various questions. (Transcript of Plea and Sentencing (TPS)). Defendant also swore (TPS 2)

that he had read and understood his plea form and claimed to have had three years of college. (3-4) Further, nowhere in his motion does Defendant now claim to have "misunderstood" what the judge told him about potential deportation. He is also now apparently claiming - with no support - that Jablon's supposed misadvice trumps what the judge clearly told Defendant.

Defendant now also attempts to down-play the fact that he swore (TPS 2) to the judge - and specifically after his attorney's further question - that no one, obviously including Jablon, had promised him anything other than what the judge had said or was in/on the plea form in order to get him to enter his plea. (TPS 4). Defendant should not now be allowed to go behind his sworn representations to the judge or imply that he should be excused for apparently lying to the judge. *Stano v. State,* 520 So.2d 278, 280 (Fla. 1988). This itself should be conclusive refutation of his instant assertion that Jablon had made him assurances *not* on the plea form that led him to enter a plea which he otherwise would not have entered. (Without a copy of the plea form, it is "assumed" that the form does not indicate at any place that Defendant had been promised by Jablon or anyone else that the guilty plea would not result in any "immigration consequences") . (If in fact Jablon made such a promise, he must have apparently been correct based on the then-current immigration law, since Defendant had no concerns for over ten years after his plea. Immigration law and criteria for

deportation obviously change, and no attorney could make long-term (accurate) predictions). Thus the main purpose of Fla.R.Crim.P. 3.172(c) (8) would appear to be to tell defendants only of the *potential* for deportation and no more).

Beyond this, the State believes that Defendant's motion is legally insufficient under *State v. Green,* 944 So.2d 208 (Fla. 2006), which has finally attempted to put some time limitations on deportation claims. Importantly, Defendant does *not* claim that under current law he is presently subject to or has been threatened with deportation in the future - but only that he has "now learned" that his guilty plea from over eight years ago will deny him "lawful permanent residence" and U.S. citizenship - not that he will be deported. It is also somewhat humorous that Defendant now claims that he "learned" on October 26, 2006 - coincidentally the date of the *Green* opinion which instituted a 2-year deadline from the date of the opinion to file such motions, which Defendant beat by three days - (only) that he "could" be subject to deportation. That is insufficient. Defendant is not subject to nor threatened with deportation and is simply filing his motion as a potential safety measure 3 days before the deadline. He certainly does not swear in his motion that deportation proceedings have been instituted - presumably because they have not been.

The State believes the record conclusively refutes Defendant's claim that his guilty plea was

not voluntary. Further, the State believes the motion is legally insufficient under *State v. Green, supra.*

WHEREFORE, the State believes the motion should be summarily denied and that the evidentiary hearing set for December 16, 2008, should be cancelled.

I **HEREBY CERTIFY** that a true copy of the foregoing has been furnished by U.S. mail to Christopher L. Smith, Esquire, 390 N. Orange Ave., Suite 2100, Orlando, FL 32801, on the 9th day of December, 2008.

/s/
Wilson Green III, FBN 298972
Assistant State Attorney
415 N. Orange Ave.,
P.O. Box 1673
Orlando, FL 32801
(407)836-2406

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR OSCEOLA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

F E L O N Y
DIVISION 201
CASE NO.: CR97-1899

RICHARD VEZINA,

Defendant.
_____/

ORDER DENYING MOTION TO SET ASIDE PLEA AND VACATE SENTENCE

THIS CAUSE having come before the Court on this day, upon the Motion to Set Aside Plea and Vacate Sentence which was filed October 23, 2008, and being otherwise fully advised in the premises, it is hereby:

ORDERED AND ADJUDGED that said motion is hereby DENIED.

DONE AND ORDERED in Chambers at Kissimmee, Osceola County, Florida this 16th day of December, 2008.

/s/
SCOTT POLODNA, Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by interoffice/U.S. Mail delivery to the Office of the State Attorney, via interoffice mail; and Christopher L. Smith, Esquire, via facsimile 407-841-2889, this 17th day of December, 2008.

/s/
Judicial Assistant

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR OSCEOLA COUNTY, FLORIDA
CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA,

Plaintiffs, Honorable Scott Polodna

v. CASE NO. 49-97-CF-1899

RICHARD VEZINA,

Defendant.
_____/

DEFENDANT'S MOTION FOR REHEARING

COMES NOW the Defendant, **RICHARD VEZINA**, by and through his undersigned attorney, and pursuant to Rule 3.850(g), FRCrP, moves this Honorable Court to grant a Rehearing on the Motion to Set Aside Plea and Vacate Sentence in this cause and as grounds therefore would show:

1. This matter began pursuant to Defendant's Motion to Set Aside Plea and Vacate Sentence.

2. (a) The procedural history is as follows: Defendant filed a Motion to Set Aside Plea and Vacate Sentence on October 22, 2008.

(b) Subsequent to the Motion being filed, the Court granted an Evidentiary hearing in this matter which was scheduled for December 16, 2008.

(c) On or about December 10, 2008, the State filed a Response to Defendant's Motion for Post Conviction Relief.

(d) On December 15, 2005, while the undersigned was in a jury trial, the undersigned received an e-mail from the State seeking a continuance of the Hearing based upon the fact that they had not received sufficient notice and their witnesses were not subpoenaed.

(e) Subsequent to that e-mail, on December 17, 2008, undersigned counsel received an Order Denying Motion to Set Aside Plea and Vacate Sentence. There were no findings in the Order for the undersigned to determine why said Motion was denied without Hearing.

3. That response filed by the State to Defendant's Motion to Set Aside Plea and Vacate Sentence was based on two grounds:

(a) That the Court had provided sufficient warning regarding immigration consequences which, was contained in the transcript of the Plea;

(b) That the Defendant failed to state prejudice to warrant the granting of the Motion.

4. The Defendant's Motion to Set Aside Plea and Vacate Sentence is specifically predicated upon the ground that he received affirmative misadvice of counsel. This type of review is not subject to the Strickland standard and the only determination for the Court is to see if. in fact, affirmative misadvice occurred. The State does not allege any matters within their response which denies that the Defendant received affirmative rnisadvice from his attorney and as such, is entitled to an Evidentiary Hearing on that issue alone. Rensoli v. State, 718 So.2d 1278 (3rd DCA 1998).

5. The Defendant sufficiently alleged prejudice that resulted from the affirmative misadvice of counsel. The State, in their response, incorrectly represents that deportation is the only prejudice that could result from the affirmative misadvice from the attorney and therefore, his claim should be summarily denied, The immigration consequences are outlined in Defendant's Motion to Set Aside Plea and Vacate Sentence. This is further substantiated by the Affidavit from an expert witness detailing how the Plea affected the Defendant's immigration status here in the United States. A copy of said Affidavit is attached hereto and incorporated herein for all purposes as Exhibit "A".

6. It is clear from the case law in the State of Florida that misadvice by counsel regarding any issue which later turns out not to be

true and prejudices the Defendant in any manner entitles him to relief in this cause. Benelbocine v. State. 787 So.2d 38 (2nd DCA 2001). Further, the Defendant is entitled to an Evidentiary Hearing on his Motion when he alleges counsel affirmatively told him that there could be ***no*** immigration consequences for the entry of his Plea. Ghanavati v. State, 820 So.2d 989 (4th DCA 2002).

MEMORANDUM OF LAW

The state suggests that the court's boilerplate advice about possible deportation should "trump" defense counsel's advice concerning the actual immigration consequences of the case for the particular defendant. (Response 2.) The court gives exactly the same advice to every single defendant (even including U.S. citizen defendants), even though each defendant's immigration situation may be different, and the specific immigration consequences for each defendant may be different. It is proper for the court to give generalized advice, to raise a red flag about a damaging possible consequence, so the defendant and defense counsel can look into the danger, and see if it is really there. After ascertaining whether the particular defendant is indeed a foreign national subject to danger of deportation, competent defense counsel will look into it directly or by seeking advice from immigration counsel on the exact immigration consequences of the particular plea for the particular defendant, and then advise the defendant as to the actual immigration

consequences of this particular plea. If they are damaging defense counsel and the defendant can try to negotiate an immigration harmless disposition if possible. Then, defense counsel would presumably - based on the investigation of the immigration facts, and legal research into the immigration law or consultation with an expert - advise the client that this plea will not in fact result in deportation. Obviously, a reasonable defendant will place more confidence in this informed legal opinion, supported by the facts and law relating to his or her individual case, than in the court's generalized, blind, boilerplate advice given to all defendants, even U.S. citizens.

The majority rule in the different federal circuit courts of appeal and many states is that defense counsel's legal advice on the immigration consequences - if it is incorrect -can constitute ineffective assistance of counsel, requiring reversal of the conviction if prejudice is shown. Affirmative misadvice by defense counsel concerning immigration consequences constitutes a federal constitutional ground to set aside a conviction, in a majority of the circuits.[1] The prevailing federal rule[2] which must perforce apply as well in all state courts, holds that a conviction is legally invalid at the time it came into existence if it results from ineffective assistance of counsel in giving *affirmative misadvice* concerning the immigration consequences of the plea, so long as the error is prejudicial.[3]

See N. Tooby & I. ROLLIN, CRIMINAL DEFENSE OF IMMIGRANTS § 11.70(D).

[2] *United State* v. *Couto,* 311 F.3d 179 (2d Cir. 2002) (defense counsel gave affirrnative misadvice by saying that a conviction would not trigger deportation, where in fact it was an aggravated felony triggering mandatory deportation); see also *Dmvlls-Morgan* v. *United States,* 765 F.2d 1534, 1541 (11thCir. 1985); *Holmes v. United States*, 876 F.2d 1545(11th Cir. 1989); *Ostrander* v. *Green,* 46 F.3d 347,355 (4th Cir, 1995), *overruled on other grounds, O'Dell* V. *Netherland,* 95 F.3d 214, 1222-23 (4th Cir. 1996)

[3] *United States v. Kwan,* 407 F.3d 1005, 1014 (9th Cir. 2005) (affirmative misadvice concerning adverse immigration consequences of a plea constitutes ineffective assistance of Counsel); see *In re Resendiz,* 25 Cal.4th 230 (2001) (reviewing federal authorities on this point, and applying them in a state case).

The giving of the court's generalized advice, pursuant to a state statute, obviously cannot and does not excuse counsel's constitutional error in violation of the U.S. Constitution. See *In re Resendiz,* 25 Cal.4th 230, 240 - 242; 19 P.3d 1171, 1177-1179 (2001).

The State argues that a statement during the plea proceedings that no other promises have been made to induce the plea applies to defense counsel's legal advice concerning immigration consequences. (Response 3.) This is not true. *Bowers* v. *Saffle,* 216 P.3d 918, 925-26 (10th Cir. 2000); *Goodall v, United* States, 759 A.2d 1077. 1082 (D.C. App. 2000); *Hill v. Lockhart,* 894 F.2d 1009 (8th cir. 1999), *cert. denied,* 497 U.S. 1011 (1999). The language concerning promises always refers to direct penal consequences in criminal court, such as dismissal of charges or promises as to sentence; things the criminal court will impose as sentence. The reference to promises has nothing to do with what a different federal agency might or not do at some future time and place in a completely different proceeding. There is no reason to believe that anyone, much less the defendant, understood "promises" in that context to apply to defense counsel's legal advice concerning the immigration consequences of the plea.

The State argues that if defense counsel made that promise, it must have been correct at the time, because Mr. Vezina had no concerns for over 10 years after the plea was entered. (Response 3.)

This is not true. Mr. Vezina believed defense counsel's incorrect statement that the Plea would in fact not result in his deportation. He never learned that this advice was wrong until late in 2006. The evidence in support of the motion establishes that defense counsel's immigration advice was mistaken under the law at the time of the plea. The State has produced no evidence, and only a false inference, to the contrary.

The State says the main purpose of the rule is to tell the defendant the potential for deportation. (Response 3.) This is correct. Once so informed, the defendant and defense counsel- as indicated above - will see whether the danger applies to the specific defendant and specific plea and try to avert it, and defense counsel will go beyond the court's generalized advice and tell the client what the situation is in his or her specific case. See point 1, above.

The State argues the motion is legally insufficient under *Green*. (Response 3-4.) The *Green* decision, however, has no application to a claim of ineffective assistance of counsel, such as the claim raised here. Its application is limited to claims of violation of the rule.

The State claims that Mr. Vezina is not threatened with deportation, but simply filing the motion as a safety measure three days before the deadline. (Response 4.) The State. however, confuses deportation with inadmissibility. The rule

merely requires the court to warn the defendant about the possibility of deportation. Counsel's obligation to give accurate immigration advice - if counsel gives such advice at all - is not so limited. There are many different forms of damaging immigration consequences that may be triggered by criminal convictions. Chief among them are (a) deportation (where one is thrown out of the country after first being legally admitted), and (b) inadmissibility (where a person is barred - as Mr. Vezina is barred - from obtaining Lawful Permanent Resident status or barred from entry into the U.S. from abroad). The second consequence is the one causing damage to Mr. Vezina. As the evidence in support of the motion establishes, this conviction forces the immigration authorities to deny his application for Lawful Permanent Resident status, after which he will be removed from the country for lack of legal status. 'Technically this is not "deportation" but it amounts to the same thing, and he is certainly threatened with it as a result of this conviction since it is absolutely certain eventually to occur. This was proven in the evidence submitted in support of the Motion.

WHEREFORE, the Defendant prays this Honorable Court grant a Re-Hearing on this matter and set an Evidentiary Hearing to determine the validity of the Motion.

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by Facsimile/Hand-Delivery/U.S. Mail to Wilson Green, Esq., Assistant State Attorney, P.O. Box 1673, Orlando, FL, 32802-1673, this 23rd day of December 2008.

/S/

CHRISTOPHER L. SMITH, ESQ.
390 North Orange Ave., Suite 2100
Orlando, FL 32801
TEL: 407-897-6838
FAX: 407-841-2889
Florida Bar No. 367461
Attorney for Defendant

IN THE CIRCUIT COURT OF THE NINTH
JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff.

vs. CASE No. CR97-1899

RICHARD VEZINA,

DIVISION 11

Defendant.
_____/

STATE'S RESPONSE TO DEFENDANT'S MOTION FOR REHEARING

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, and in response to Defendant's Motion for Rehearing following the Court's summary denial of his Motion to Set Aside Plea and Vacate Sentence filed pursuant to Fla.R.Crim.P. 3.850(a)(5), states as follows:

The State of course relies on its previous written response to Defendant's original motion in addition to this response. Further, the State includes the following general discussion:

The 5th DCA has made it clear that if a defendant does not file a post-sentencing motion to

withdraw plea, all issues are waived concerning the plea proceedings, and a 3.850 motion alleging an involuntary plea must be based on the collateral claim of ineffective assistance of counsel. *See Rogers v. State,* 864 So.2d 521 (Fla. 5th DCA 2004); *Barnhill v. State,* 828 So.2d 405 (Fla. 5th DCA 2002); *Jackson v. State*, 801 So.2d 1024 (Fla. 5th DCA 2001).

While an involuntary plea is thus a recognized ground for postconviction relief, in *Mikenas v. State,* 460 So.2d 359 (Fla. 1984), the Florida Supreme Court held that a defendant has the burden of showing that his plea was not knowing or voluntary. *See also, Smothers v. State,* 555 So.2d 452 (Fla. 5th DCA 1990).

Furthermore, an allegation that a plea was involuntary or was based on a misunderstanding or mistake can be refuted by a written plea agreement or plea transcript which conclusively establishes the defendant's understanding and that the plea was not coerced. *See Knowles* V. *State,* 582 So.2d 167 (Fla. 1st DCA 1991); *Rackley v. State,* 571 So.2d 533 (Fla. 1st DCA 1990) .

Additionally, such a motion should assert that were it not for counsel's ineffective assistance, that a defendant would not have entered his plea but would have *insisted* on a trial. *Brown v. State,* 943 So.2d 899 (Fla. 5th DCA 2006).

A reading of Defendant's original motion

confirms that his argument was that he was misadvised by his counsel that his guilty plea in this case would not result in any "immigration consequences." However, he went on to specifically indicate (in paragraph 10) that his counsel had (wrongly) advised him that the plea would not "expose him to *deportation.*" As noted in the State's original response, Defendant has not asserted that he is actually subject to or threatened with deportation, but only that he cannot obtain permanent residence or U.S. citizenship. When Defendant entered his plea, he had been clearly told by the judge that his guilty plea could be used to deport him. Defendant also swore that he had been promised nothing (off-record) to induce an otherwise voluntary plea.

The State is a bit confused by Defendant's motion for rehearing because he now seems to have changed his tack. He now appears to say that the basis of his original motion had nothing to do with whether the judge's deportation warning was sufficient or insufficient, although he obviously argued such in paragraph 3 and in his memorandum. Yet he now also argues that while not technically "deportation," the denial of permanent residence/citizenship "amount(s) to the same thing." But, as noted, in his original motion the claim is specifically made that his counsel misadvised Defendant that his plea would not expose him (only) to "deportation." (This point is further confirmed by Defendant's instant motion (at page 6) where he writes, "Mr. Vezina believed

defense counsel's incorrect statement that the Plea would in fact not result in his *deportation."* (Emphasis added). Defendant also now incongruously states that *State v. Green,* 944 So.2d 208 (Fla. 2006) has nothing to do with his claim, although he obviously referred to related cases in his original motion (such as *Peart)* and clearly alluded to the exact date of the *Green* opinion in arguing that his motion was timely.

Regardless, it is telling that Defendant has never claimed that his counsel specifically told him, in addition to not being exposed to deportation, that he would never be denied permanent residence or citizenship. This is not meaningless semantics, particularly when the judge had told Defendant his plea could be used to deport him.

If in fact Defendant understood the alleged advice of his lawyer about not being deported to also include permanent residency or citizenship - although, as noted, he never alleges hiscounsel told him that it did - maybe Defendant should be "estopped" and his claim refuted simply because, if in fact his plea was (in hindsight) truly involuntary only because it was of paramount importance that he become a permanent U.S. resident or citizen, he obviously made no effort to become either one during the many intervening years after his guilty plea. Such inaction would seem to belie the genuineness of Defendant's claim.

But even assuming Defendant was

affirmatively misadvised that he would not be deported as a result of his guilty plea - although, as noted, such advice may well have been correct when given, (and is such advice "guaranteed" *ad infinitum* regardless of future changes in deportation criteria?) - the fact is that the record shows that the judge properly put Defendant on notice that his guilty plea could be used to deport him. Thus even if his counsel, *arguendo,* gave him bad advice, the, judge corrected it and, at the very least, made Defendant aware that the potential of deportation existed, no matter what Defendant might have previously been told.

The State does believe that the judge's advice "trumped" the alleged misadvice of counsel. While the State has not found a case exactly on point regarding deportation, the principle is clearly enunciated in *Bond v. State,* 695 So.2d 778, 779 (Fla. 1st DCA 1997), where the defendant claimed he had been misadvised by counsel that he could later withdraw his no contest plea: "Any misunderstanding the defendant may have had about the plea after speaking with his lawyer was corrected by the information the trial court provided during the plea hearing." The same principle is also evident in *Leroux* V. *State,* 689 So.2d 235, 238 (Fla. 1996), where the court suggested that a claim of counsel's misadvice about the actual length of the defendant's sentence could be nipped in the bud if the trial court at the plea hearing were to tell a defendant that he may have to serve every day of his sentence regardless of anyone's 'computation,

because: "A defendant who is informed by the court during the plea colloquy that he may have to serve every day of a ten-year sentence could hardly reasonably rely on counsel's advice to the contrary." *See also Tommie v. State,* 945 So.2d 633, 636 (Fla. 4th DCA 2006) ("Thus, any deficiency in counsel's advice was cleared up by the information the court provided during the plea colloquy.") . Had the judge failed to advise Defendant of potential deportation as a result of the guilty plea, it would be a different situation and the State would likely have conceded that an evidentiary hearing was needed.

Thus, regardless of whether Defendant chose to take counsel's alleged misadvice over the judge's contrary advice and/or whether Defendant' simply took a calculated risk that he would not be deported, he made an informed decision and his plea was voluntary.

WHEREFORE, the State believes Defendant's Motion for Rehearing should be denied.

I HEREBY CERTIFY that a true copy of the foregoing has been, furnished by U.S. mail to Christopher L. Smith, Esquire, 390 N. Orange Ave., Suite 2100, Orlando, FL 32801, on the 9th day of December, 2009.

/s/

Wilson Green, III,
FBN 298972
Assistant State Attorney
415 N. Orange Ave.,
P.O. Box 1673
Orlando, FL 32801
(407) 836-2406

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR OSCEOLA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff, FELONY DIVISION 201

vs. CASE NO.: CR97-1899

RICHARD VEZINA,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR REHEARING

THIS CAUSE having come before the Court on this day, upon the Motion for Rehearing which was filed December 29, 2008, and being otherwise fully advised in the premises, it is hereby:

ORDERED AND ADJUDGED that said motion is hereby DENIED.

DONE AND ORDERED in Chambers at Kissimmee, Osceola County, Florida this 4th day of February, 2009.

/s/
SCOTT POLODNA, Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by interoffice/U. S. Mail Delivery for the Office of the State Attorney, via interoffice mail; and Christopher L. Smith, Esquire, via facsimile 407-841-2889, this 5th day of February, 2009.

/s/
Judicial Assistant

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA

FIFTH DISTRICT JANUARY
TERM 2009

RICHARD VEZINA,

Appellant,

CASE NO. 5D09-859

STATE OF FLORIDA,

Appellee.
_____/

Decision filed June 23, 2009

3.850 Appeal from the Circuit
Court for Osceola County,
Scott Polodna, Judge.

Christopher L. Smith, Orlando, for
Appellant.

No Appearance for Appellee.

PER CURIAM.

AFFIRMED.

PALMER, C.J., LAWSON and EVANDER, JJ., concur.

IN THE SUPREME COURT OF THE STATE OF FLORIDA

RICHARD VEZINA, Petitioner,

v.

STATE OF FLORIDA, Respondent

PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER L. SMITH, ESQ.
Counsel of Record
390 North Orange Ave.,Suite 2100
Orlando, FL 32801
TEL: 407-897-6888
FAX: 407-841-2889
Florida Bar No. 367461

Counsel for Petitioner

August 20, 2009

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PETITION FOR WRIT OF CERTIORARI

Richard Vezina respectfully petitions for a writ of certiorari to review the judgment of the District Court of Appeal of Florida for the Fifth District affirming the denial of Petitioner's Motions to Set Aside Plea and Rehearing by the Trial Court below.

BASIS FOR INVOKING JURISDICTION

Comes now Petitioner, **RICHARD VEZINA**, and pursuant to Article V, Section 3(b)(3), Florida Constitution, Fla. R. App. P. 9.100 and 9.030(a)(2)1A ii and the Sixth and Fourteenth Amendments to the United States Constitution, files this petition seeking review by this Court's certiorari jurisdiction in that the lower court affirmed an Order of he trial court denying the Petitioner's Motion for Post Conviction Relief and Rehearing without holding an evidentiary hearing.

FACTS UPON WHICH PETITIONER RELIES

This matter began pursuant to Defendant's Motion to Set Aside Plea and Vacate Sentence.

On February 20, 1998, the Petitioner entered

a Plea and was sentenced to probation for the offense of Possession of Cocaine. The Defendant successfully completed his probationary sentence.

When the Petitioner entered the Plea, there was no information with respect to the immigration consequences on the Plea form.

A transcript of the plea demonstrated that the trial judge made a fleeting reference to immigration consequences but did not fully inform the Petitioner to comply with Rule 3.172(c)(8), which requires the Court to take the Plea and advise the Defendant in every case before the Plea of the possibility of deportation as a result of the conviction.

The Court did not ask the Defendant if he understood that his plea could lead to deportation. The plea form contains no immigration warning. The judge, however, orally warned the Defendant: "I have to tell you that if you're not a citizen of the United States, this plea could be used to deport you." (T 4:8-10). The court in taking the plea must advise the defendant, in every case before plea, of the possibility of deportation as a result of the conviction. The court must go further and ask the defendant whether he *understands* this warning. This, the court failed to do.

At all times while this matter was pending and pursuant to reviewing the Plea form with his trial attorney, the Petitioner's attorney informed

him that this Plea would not result in any immigration consequences.

The Petitioner has now learned that the entry of the plea in this cause has denied him lawful permanent residence, nor can he obtain U. S. Citizenship. Further, as of October 26, 2006, the Petitioner learned that he could be subject to deportation.

In September, 2007, the Petitioner met with an attorney and was advised that the time for the filing of the motion for post conviction relief, pursuant to Rule 3.850 did not end until two years after the Petitioner "obtained knowledge" of the consequences.

This situation involved affirmative misadvice by the Petitioner's counsel, thus it is not subject to a Strickland standard for review.

The Petitioner is a citizen of Canada who has lived in the United States for more than 22 years. He has been married to a United States citizen since 1996, and wants to become a lawful permanent resident of the United States.

In order to obtain lawful permanent resident status, the Petitioner needs to vacate the 1998 conviction for possession of cocaine.

The Petitioner was represented by Michael Entin, Esq., and Steve Jablon, Esq. The Petitioner's

counsel, Steven Jablon, Esq., who made the court appearance for the plea was aware the Petitioner was not a U. S. Citizen. The Petitioner specifically discussed the immigration consequences of the case with Mr. Entin who affirmatively advised the Defendant that the plea would not expose him to deportation.

The Petitioner would not have entered a plea to this offense had he known the drug offense would subject him to deportation. This case arose out of an assault investigation. Assault is not a deportable offense, so long as a one year custody sentence is not imposed. The Petitioner could have entered a plea to an assault charge instead of the possession charge, and thereby avoided deportation.

The procedural history is as follows: Defendant filed a Motion to Set Aside Plea and Vacate Sentence on October 22, 2008. Subsequent to the Motion being filed, the Court granted an Evidentiary Hearing in this matter which was scheduled for December 16, 2008. On or about December 10, 2008, the State filed a Response to Defendant's Motion for Post Conviction Relief. On December 15, 2008, while the undersigned was in a jury trial, the undersigned received an e-mail from the State seeking a continuance of the Hearing based upon the fact that they had not received sufficient notice and their witnesses were not subpoenaed. Subsequent to that e-mail, on December 17, 2008, undersigned counsel received an Order Denying Motion to Set Aside Plea and

Vacate Sentence. There were no findings in the Order for the undersigned to determine why said Motion was denied without Hearing. Nor, was there any explanation as to why a hearing had been scheduled but was no longer to be held.

The response filed by the State to Defendant's Motion to Set Aside Plea and Vacate Sentence was based on two grounds:

(a) That the Court had provided sufficient warning regarding immigration consequences which was contained in the transcript of the Plea;

(b) That the Defendant failed to state prejudice to warrant the granting of the Motion.

The Petitioner filed a timely Motion for Rehearing. The trial court below denied the Motion for Rehearing and the Petitioner filed a timely Notice of Appeal on February 26, 2009. On June 23, 2009, the Fifth District Court of Appeal returned a Per Curiam Affirmed opinion which was rendered on July 15, 2009.

ISSUE

Whether criminal defense counsel's affirmative misadvice to the defendant concerning the immigration consequences of a plea constitutes ineffective assistance of counsel, in violation of the Sixth Amendment to the United States Constitution, as applied to the statues by the

Fourteenth Amendment, rendering the guilty plea which was induced by that faulty advice legally invalid?

ARGUMENT

The Defendant's Motion to Set Aside Plea and Vacate Sentence is specifically predicated upon the ground that he received affirmative misadvice of counsel. This type of review is not subject to the Strickland standard and the only determination for the Court is to see if, in fact, affirmative misadvice occurred. The State does not allege any matters within their response which denies that the Petitioner received affirmative misadvice from his attorney and as such, Petitioner is entitled to an Evidentiary Hearing on that issue alone. Rensoli v. State, 718 So.2d 1278 (3rd DCA 1998).

The Petitioner sufficiently alleged prejudice that resulted from the affirmative misadvice of counsel. The State, in their response, incorrectly represents that deportation is the only prejudice that could result from the affirmative misadvice from the attorney and therefore, his claim should be summarily denied. The immigration consequences are outlined in Petitioner's Motion to Set Aside Plea and Vacate Sentence. The consequences are further substantiated by an Affidavit from an expert witness detailing how the Plea affected the Petitioner's immigration status here in the United States.

It is clear from the case law in the State of Florida that misadvice by counsel regarding any issue which later turns out not to be true and prejudices the Petitioner in any manner entitles him to relief in this cause. Benelhocine v. State, 787 So.2d 38 (2nd DCA 2001). Further, the Petitioner is entitled to an Evidentiary Hearing on his Motion when he alleges counsel affirmatively told him that there could be no immigration consequences for the entry of his Plea. Ghanavati v. State, 820 So.2d 989 (4th DCA 2002).

The state suggests that the court's boilerplate advice about possible deportation should "trump" defense counsel's advice concerning the actual immigration consequences of the case for the particular defendant. The court gives exactly the same advice to every single defendant (even including U.S. citizen defendants), even though each defendant's immigration situation may be different, and the specific immigration consequences for each defendant may be different. It is proper for the court to give generalized advice, to raise a red flag about a damaging possible consequence, so the defendant and defense counsel can look into the danger, and see if it is really there. After ascertaining whether the particular defendant is indeed a foreign national subject in danger of deportation, competent defense counsel will look into it directly or by seeking advice from immigration counsel on the exact immigration consequences of the particular plea for the particular defendant, and then advise the

defendant as to the actual immigration consequences of this particular plea. If they are damaging, defense counsel and the defendant can try to negotiate an immigration harmless disposition if possible. Then, defense counsel would presumably - based on the investigation of the immigration facts, and legal research into the immigration law or consultation with an expert - advise the client that this plea will not in fact result in deportation. Obviously, a reasonable defendant will place more confidence in this informed legal opinion, supported by the facts and law relating to his or her individual case, than in the court's generalized, blind, boilerplate advice given to all defendants, even U.S. citizens.

The majority rule in the different federal circuit courts of appeal and many states is that defense counsel's legal advice on the immigration consequences - if it is incorrect - can constitute ineffective assistance of counsel, requiring reversal of the conviction if prejudice is shown. Affirmative misadvice by defense counsel concerning immigration consequences constitutes a federal constitutional ground to set aside a conviction, in a majority of the circuits.[1] The prevailing federal rule[2] which must perforce apply as well in all state courts, holds that a conviction is legally invalid at the time it came into existence if it results from ineffective assistance of counsel in giving *affirmative misadvice* concerning the immigration consequences of the plea, so long as the error is prejudicial.[3]

The giving of the court's generalized advice, pursuant to a state statute, obviously cannot and does not excuse counsel's constitutional error in violation of the U.S. Constitution.

[1] See N. TOOBY, POST-CONVICTION RELIEF FOR IMMIGRANTS § 6.18 (2004).

[2] *United States* v. *Couto,* 311 F.3d 179 (2d Cir. 2002) (defense counsel gave affirmative misadvice by saying that a conviction would not trigger deportation, where in fact it was an aggravated felony triggering mandatory deportation); see also *Dmvlls-Morgan* v. *United States,* 765 F.2d 1534, 1541 (11th Cir. 1985); *Holmes v. United States,* 876 F.2d 1545 (11th Cir. 1989); *Ostrander* v. *Green,* 46 F.3d *347,355* (4th Cir. 1995), *overruled on other grounds, O'Dell v. Netherland,* 95 F.3d 214,1222-23 (4th Cir. 1996); *Bowers* v. *Saffie,* 216 F.3d 918, 925-26 (10th Cif. 2000); *Goodall v. United States,* 759 A.2d 1077. 1082 (D.C. App. 2000); *Hill* v. *Lockhart,* 894 F.2d 1009 (8th cir. 1999), *cert. denied,* 497 U.S. 1011 (1999).

[3] *United States v. Kwan,* 407 F.3d 1005, 1014 (9th Cir. 2005) (affirmative misadvice concerning adverse immigration consequences of a plea constitutes ineffective assistance of counsel); see *In re Resendiz,* 25 Cal.4th 230 (2001) (reviewing federal authorities on this point, and applying them in a state case).
See *In re Resendiz,* 25 Cal.4th 230, 240 - 242; 19 P.3d 1171, 1177- 1179 (2001).

The State argued that a statement during the plea proceedings that no other promises have been made to induce the plea applies to defense counsel's legal advice concerning immigration consequences. This is not true. The language concerning promises always refers to direct penal consequences in criminal court, such as dismissal of charges or promises as to sentence; things the criminal court will impose as sentence. The reference to promises has nothing to do with what a different federal agency might or might not do at some future time and place in a completely different proceeding. There is no reason to believe that anyone, much less the defendant, understood "promises" in that context to apply to defense counsel's legal advice concerning the immigration consequences of the plea.

The State argued that if defense counsel made that promise, it must have been correct at the time, because Mr. Vezina had no concerns for over 10 years after the plea was entered. This is not true. Mr. Vezina believed defense counsel's incorrect statement that the Plea would in fact not result in his deportation. He never learned that this advice was wrong until late in 2006. The evidence in support of the motion establishes that defense counsel's immigration advice was mistaken under the law at the time of the plea. The State has produced no evidence, and only a false inference, to the contrary.

The State asserted that the main purpose of the rule is to tell the defendant the potential for deportation. This is correct. Once so informed, the defendant and defense counsel - as indicated above - will see whether the danger applies to the specific defendant and specific plea and try to avert it, and defense counsel will go beyond the court's generalized advice and tell the client what the situation is in his or her specific case.

The State argued the motion was legally insufficient under *Green.* The *Green* decision, however, has no application to a claim of ineffective assistance of counsel, such as the claim raised here. Its application is limited to claims of violation of the rule.

The State claimed that Mr. Vezina is not threatened with deportation, but simply filing the motion as a safety measure three days before the deadline. The State, however, confuses deportation with inadmissibility. The rule merely requires the court to warn the defendant about the possibility of deportation. Counsel's obligation to give accurate immigration advice - if counsel gives such advice at all - is not so limited. There are many different forms of damaging immigration consequences that may be triggered by criminal convictions. Chief among them are (a) deportation (where one is thrown out of the country after first being legally admitted), and (b) inadmissibility (where a person is barred - as Mr. Vezina is barred - from obtaining Lawful Permanent Resident status or barred from

entry into the U.S. from abroad). The second consequence is the one causing damage to Mr. Vezina. As the evidence in support of the motion establishes, this conviction forces the immigration authorities to deny his application for Lawful Permanent Resident status, after which he will be removed from the country for lack of legal status. Technically, this is not "deportation," but it amounts to the same thing, and he is certainly threatened with it as a result of this conviction since it is absolutely certain to occur. This was proven in the evidence submitted in support of the Motion.

There can be no doubt that a lawyer's *misadvising* the client on legal questions of importance to the plea, without exercising even reasonable diligence to investigate the issue, is "objectively unreasonable" in almost all circumstances. "Counsel who gives erroneous advice to a client which influences a felony conviction is worse than no lawyer at all. Common sense dictates that such deficient lawyering goes to effectiveness." United States v. Couto, 311 F.3d at 187 (2bd Cir. 2002). The overwhelming majority of courts that apply the collateral consequences rule to failure-to-advise claims also hold that that rule does not apply where counsel misadvises the defendant.

A criminal defendant is highly vulnerable in a criminal prosecution. As noted above, "the average defendant does not have the professional legal skill to protect himself when brought before a

tribunal with power to take his life or liberty....." Zerbst, 304 U.S. at 462-63. Guilty pleas in particular, because they result in convictions, demand "the utmost solicitude" for the defendant. Nixon, 543 U.S. at 187. "[I]ntellingent assessment of he relative advantages of pleading guilty is frequently impossible without the assistance of any attorney," Brady, 397 U.S. at 749 n.6., including an independent examination of the law as applied to the facts. Von Moltke, 332 U.S. at 721. Thus, the defendant necessarily relies on the accuracy of therepresentations defense counsel makes regarding the law and its applications, for typically the defendant lacks the wherewithal to question them.

Deportation consequences will commonly be important to plea decisions, and in some circumstances the most important factor. St. Cyr, 533 U.S. at 322. Thus, it is a breach of trust and of the special relationship between counsel and client for counsel to render advice, without even investigating its accuracy, on matters so critical to the defendant in deciding whether to plead guilty to a felony and forfeit his constitutional rights. The Ninth Circuit so concluded in Kwan, reasoning that even if counsel did not have to give the defendant advice about deportation, misleading him on the subject was "objectively unreasonable under contemporary standards for attorney competence." 407 F.3d at 1015-16. Having held himself out as competent to provide advice on the subject, counsel violated "a basic rule of professional conduct that a

lawyer must maintain competence by keeping abreast of changes in the law and its practice." *Id.* At 1016 (citing Model Rules of Prof'l Conduct R. 1.1 [6]).

False representations that the attorney freely makes on legal matters distort the defendant's decision to plead guilty. It is common to draw a line in the law based on the decision to speak in circumstances where one induces reliance. For example, absent an independent duty to speak, silence will not give rise to liability for negligent misrepresentation. But if a professional supplies false information that induces justifiable reliance by others, he will be liable for failing to exercise due care. *Restatement (Second) of Torts § 552 (1965).* On the same principle, if a lawyer supples false information about deportation consequences that affects the defendant's decision to plead guilty, the lawyer has been ineffective in assisting the defendant, even if he had no duty to investigate collateral consequences in the first place. "One would not suppose that the collateral consequence rule ... would apply in a situation in which defendant's guilty plea was induced by actual misadvice respecting some collateral consequence when that consequence was of substantial importance to the defendant." Mott v. State, 407 N.W.2d at 583-84 (internal quotation marks omitted). "If the defendant's pleas were made in reasonable reliance upon the advise or representation of his attorney, which advice or representations demonstrated incompetence, then it

can be said that the defendant's pleas were not voluntary[.]" People v. Correa, 485 N.E.2d at 310; *accord* Strader, 611 F.2d at 65. *See also* Evitts v. Lucey, 469 U.S. 387 (1985) (State has no obligation to provide appeal, but must assure effective assistance of counsel if appeal is provided).

See Santobello v. New York, 404 U.S. 257, 262 (1971). In Brady, the Court recognized that misrepresentation by the court, the prosecutor, or his own counsel that induces a plea materially invalidates it. 397 U.S. at 755. In the same vein, false representations by incompetent counsel on the critical issue of deportation that prejudicially induce a guilty plea should give rise to a Sixth Amendment claim.

CONCLUSION

Affirmative misadvice by counsel as to the immigration consequences of the entry of a plea violates the Sixth and Fourteenth Amendments of the Unite States Constitution. Where evidence of said misadvice is uncontroverted, an evidentiary hearing should be held.

This Court should vacate the ruling of the Fifth District Court of Appeal and Trial Court and remand this matter for an evidentiary hearing.

Respectfully submitted,

/S/

CHRISTOPHER L. SMITH, ESQ.
390 North Orange Avenue,
Suite 2100
Orlando, FL 32801
TEL: 407-897-6888
FAX: 407-841-2889
Florida Bar No. 367461
COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was furnished by U.S. Mail to Bill McCollum, Attorney General, State of Florida, The Capitol PL-01, Tallahassee, FL, 32399-1050 and the original has been furnished by overnight delivery via FedEx to the Honorable Thomas Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, FL, 32399-6556, this 20th day of August, 2009.

/S/

CHRISTOPHER L. SMITH, ESQ.
COUNSEL FOR PETITIONER

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is proportionally spaced 14 point Times New Roman.

/S/

CHRISTOPHER L. SMITH, ESQ.
COUNSEL FOR PETITIONER

SUPREME COURT OF FLORIDA

WEDNESDAY, AUGUST 26, 2009

CASE NO.: SCO9-1537

Lower Tribunal
No(s).: 5D09-859,
49-97-CF-1899

RICHARD VEZINA vs. STATE OF FLORIDA

Petitioner(s)

Respondent(s)

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. See Jenkins v. State, *385* So. 2d 1356 (Fla. 1980).

No motion for rehearing will be entertained by the Court.

A True Copy

Test:

/s/
Thomas D. Hall
Clerk, Supreme Court

jn
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Supreme Court, U.S.
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No. 09-628

In The
Supreme Court of the United States

RICHARD VEZINA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

REPLY BRIEF

NORTON TOOBY*
ROSE CAHN
LAW OFFICES OF NORTON TOOBY
6333 Telegraph Avenue, Suite 200
Oakland, CA 94609
(510) 601-1300
(510) 595-6772 (fax)
ntooby@criminalandimmigrationlaw.com
**Counsel of Record*

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

In the Florida state courts, Petitioner raised the same federal claim that this Court recently decided in *Padilla v. Kentucky*, ___ U.S. ___, 2010 WL 1222274 (March 31, 2010). Petitioner exhausted his state remedies by fairly presenting the claim to the Florida trial court, the District Court of Appeal, and finally to the state Supreme Court in a timely request to invoke its discretionary jurisdiction. Petitioner then timely filed a petition for a writ of certiorari before this Court, asking it – if Padilla prevailed – to grant certiorari, reverse, and remand this case to the Florida courts with instructions to reconsider it in light of *Padilla*.

In Respondent's Brief in Opposition (hereinafter "Respondent's Brief"), the State makes three arguments in opposition to a grant of certiorari.

> (1) The State unsuccessfully attempts to distinguish *Padilla* from the present case on its facts. *See* Argument I, below.
>
> (2) The State argues two "procedural defaults" under Florida state law as adequate and independent state grounds for denying relief, even though it did not raise them before the Florida courts and those courts did not deny relief on that basis. *See* Argument II, below.
>
> (3) The State argues that Petitioner should have filed the petition for a writ of certiorari in this Court within 90 days of the District Court of Appeals decision in this

case, rather than within 90 days of the Florida Supreme Court's decision denying relief. *See* Argument III, below.

None of these arguments has merit.

ARGUMENT

I. THIS COURT'S DECISION IN *PADILLA v. KENTUCKY* IS INDISTINGUISHABLE FROM THE PRESENT CASE ON THE MERITS.

The State's first attempt to distinguish *Padilla* from the present case is nearly incoherent: "Even if [petitioner's papers were] timely filed in this Court and in the Florida courts, this case is still distinguishable from *Padilla*" because Padilla's post-conviction motion was filed on time. *Id.* at 11. This oddly circular argument seems to be no more than the argument that Petitioner's papers were not timely filed, to which Petitioner responds in Arguments II and III, below. In any event, this is not a basis on which to distinguish *Padilla* on its *merits*.

The State's second purported distinction fares no better. It argues that "it does not appear that Padilla was ever informed by the court that he faced possible deportation consequences. *Kentucky v. Padilla*, 253 S.W.3d 482 (Ky. 2008)." Respondent's Brief, p. 12. On the contrary, Kentucky requires the court to inform every defendant of the possible deportation consequences. As this Court stated: "To this end, we find it significant that the plea form currently used in

Kentucky courts provides notice of possible immigration consequences." *Padilla*, *11, n.15; *see Kentucky v. Padilla*, *supra*, 253 S.W.2d at 483 ("he was aware of the possibility of deportation"). The two cases are not distinguishable on this basis. In both cases, the defendant was informed by the court of the possible immigration consequences. In both cases, the defendant was affirmatively misadvised by defense counsel.

The State attempts to distinguish *Padilla* from this case by pointing out that in this case, "Petitioner was asked if he had been promised anything differently than that told to him by the court. Petitioner informed the trial court under oath that he had not." Respondent's Brief, p. 12. The State offers nothing other than an assumption that this standard plea colloquy language did *not* occur in *Padilla*. *Ibid.* This routine language about other promises refers to on-the-record promises in criminal court, such as dismissal of charges or agreements as to sentence. There is no reason to believe that Padilla was not asked the same question. It is very likely that this same boilerplate question and answer appeared in Padilla's plea colloquy, as it appears in virtually every plea colloquy ever taken in modern times. This does not serve to distinguish the two cases.

Finally, the State argues that petitioner "basically admitted that there was no imminent threat of deportation." Respondent's Brief, p. 13. The State has profoundly mischaracterized Petitioner's argument: "Technically this is not 'deportation' but it amounts to

the same thing, and he is certainly threatened with it as a result of this conviction since it is absolutely certain eventually to occur." Respondent's Brief, E 9.

In essence, the State argues Petitioner did not prove prejudice from the ineffective assistance that occurred when his lawyer affirmatively misadvised him that his guilty plea will not result in deportation. However, as this Court held in *Padilla*, because the state court denied relief without a hearing, the facts alleged in the motion must be taken as true. *Padilla*, p. *8. As the Kentucky courts did in *Padilla*, the Florida courts here denied the same claim without a hearing, so Petitioner's factual allegations must also be taken as true. The State has offered no legitimate basis on which to distinguish this case from *Padilla*.

II. THE STATE HAS NOT ESTABLISHED ANY STATE PROCEDURAL DEFAULTS AS ADEQUATE AND INDEPENDENT STATE GROUNDS FOR DENIAL OF RELIEF, BECAUSE (A) THE STATE DID NOT RAISE THESE ISSUES BEFORE THE STATE COURTS, AND (B) THE STATE COURTS DID NOT RELY ON THEM IN DENYING RELIEF.

The State argues two procedural defaults under Florida law as adequate and independent state grounds for denial of relief. *See* Respondent's Brief, pp. 10-11.

(1) It argues "Petitioner's attempt to seek review in the Supreme Court of Florida was untimely filed." Respondent's Brief, p. 10; *see* Argument II(A), below.

(2) It argues Petitioner's motion in the state trial court was untimely filed. Respondent's Brief, pp. 10-11; *see* Argument II(B), below.

Neither argument is well-taken.

To constitute an adequate and independent state ground supporting a denial of relief, first, the State must assert the procedural default before the state court as a reason for denying relief, and second, the state court must in fact rely on the adequate and independent state ground in denying relief. *Michigan v. Long*, 463 U.S. 1032 (1983) (state court must make "plain statement" that its decision was based on an independent, adequate state ground to rebut presumption that federal issue was determinative); *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185, 1189-1191 (1995). In this case, the State's assertions of procedural default must fail because it cannot establish that the state court clearly and unambiguously relied on them to reject the claim. *See Coleman v. Thompson*, 501 U.S. 722, 730 (1991).

Here, none of the state courts gave *any* reasoned explanation for rejecting Petitioner's federal constitutional claim. App. 1, 2, 3, 5. There is no showing to rebut the presumption that the state courts in fact rejected the claim on its merits. *See Ylst v.*

Nunnemaker, 501 U.S. 797 (1991); *Cowart v. Hargett*, 16 F.3d 642, 645 (5th Cir. 1994); *Hunter v. Aispuro*, 982 F.3d 344, 347-48 (9th Cir. 1992).

A. The Claim of Untimely Filing in the Florida Supreme Court.

This claim fails for three reasons. First, the Petition for a Writ of Certiorari was timely filed in the Florida Supreme Court, so there was no procedural default in this respect. Even if this had been a procedural default, the State did not raise this objection, and the Florida Supreme Court did not rely upon it in denying relief, so it cannot constitute an adequate and independent state ground for denying relief.

The State first claims that Petitioner did not timely file his petition for a writ of certiorari in the Florida Supreme Court because he did not file his brief within 30 days after the decision of the District Court of Appeals was "issued." Respondent's Brief, p. 10. It is wrong. Petitioner may invoke the jurisdiction of the Florida Supreme Court by filing a petition in that court within 30 days after the decision of the District Court of Appeals is "rendered." Florida Rules of Appellate Procedure, Rule 9.120(b). The DCA decision is "rendered" not on the date of issuance, but when the clerk of the lower court later files the District Court of Appeals' decision in the lower court.

Florida Rules of Appellate Procedure, Rule 9.020(h).[1] In this case, Petitioner filed his petition for a writ of certiorari in the Florida Supreme Court on the 27th day after the DCA opinion was rendered. Petitioner therefore timely filed the petition for a writ of certiorari in the Florida Supreme Court.

Second, this claim fails because the State did not raise this objection before the court below. Indeed, the State did not file any objections of any kind before the Florida Supreme Court. Because the State did not object to this "procedural default" before the state court, this issue cannot constitute an adequate and independent state ground justifying the state court's denial of relief.

Third, the Florida Supreme Court did not base its denial of relief in any way on this alleged procedural default. *See* App. 1. Therefore, this issue cannot constitute an adequate and independent state ground justifying the state court's denial of relief.

B. The Claim of Untimely Filing Before the Florida Trial Court.

This claim also fails for the same three reasons. First, the motion for post-conviction relief was timely filed in the Florida trial court, so there was no procedural default in this respect. Even if this had

---

[1] "An order is rendered when a signed, written order is filed with the clerk of the lower tribunal."

been a procedural default, the State did not raise this objection before the District Court of Appeals, or Florida Supreme Court, and those courts did not rely upon it in denying relief, so it cannot constitute an adequate and independent state ground.

Petitioner filed his post-conviction motion in the trial court within the two-year opportunity allowed in *State v. Green*, 944 So.2d 208 (Fla. 2006). The rationale for allowing this exception to the normal post-conviction statute of limitations is that it would be unfair to run the time before the defendant knew or should have known of the threat of deportation, and could first articulate a *prima facie* case. *State v. Ruiz*, ___ So.3d ___, 2010 WL 934079 (Fla. App. 2010).

Even if this had been a procedural default, the State did not raise this objection before the state courts. Respondent's Brief, C-1, F-1. On the contrary, the State explicitly stated: "Defendant is not subject to or threatened with deportation and is simply filing his motion as a potential safety measure 3 days *before the deadline*." Respondent's Brief, p. C-4 (emphasis supplied). The State expressly conceded that the motion was timely filed. This issue therefore cannot constitute an adequate and independent state ground for denial of relief.

Moreover, the District Court of Appeal and Florida Supreme Court did not rely upon any claim of untimeliness in denying relief. They denied relief with *per curiam* affirmances, without explanation.

App. 1, 2. This issue therefore cannot constitute an adequate and independent state ground for denying relief.

III. THE PETITION FOR CERTIORARI BEFORE THIS COURT WAS TIMELY FILED; EVEN IF NOT, THIS COURT HAS THE POWER TO EXCUSE THIS NON-JURISDICTIONAL PROBLEM AND SHOULD DO SO ON THE FACTS OF THIS CASE.

The State argues that under Florida law, Petitioner should have filed the petition for a writ of certiorari within 90 days of the decision of the District Court of Appeals in this case, rather than within 90 days of the Florida Supreme Court's decision. Respondent's Brief, pp. 8-10. Petitioner sought to exhaust state remedies when he timely invoked the discretionary jurisdiction of the Florida Supreme Court, which was denied. If there is discretionary review by the highest state court, it must be sought. *California v. Trombetta*, 467 U.S. 479, 484 (1984). The 90 days to file the present petition for a writ of certiorari therefore properly runs from the Florida Supreme Court's decision declining to exercise jurisdiction in this case, and the petition was timely filed.

Even if this is deemed untimely, Petitioner asks this Court to excuse this non-jurisdictional problem, and decide the present petition on its merits.

A. The Petition for a Writ of Certiorari Was Timely Filed with This Court.

When petitioner seeks discretionary review of the decision of an intermediate state appellate court by the state court of last resort, the petition for a writ of certiorari before this Court "is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review." Sup. Ct. R. 13.1.

Petitioner timely invoked the discretionary jurisdiction of the Florida Supreme Court by filing a Notice to Invoke Discretionary Jurisdiction pursuant to Florida Rules of Appellate Procedure, Rule 9.120(a) ("Discretionary Proceedings to Review Decisions of District Courts of Appeal"). Petition for a Writ of Certiorari, App. 25. Florida Rules of Appellate Procedure, Rule 9.120(a) states: "This rule applies to those proceedings that invoke the discretionary jurisdiction of the supreme court described in Rule 9.030(a)(2)(A)." Petitioner thereafter timely filed a Petition for a Writ of Certiorari. App. 11.

Florida Rules of Appellate Procedure, Rule 9.030 governs jurisdiction of the Florida Supreme Court. Rule 9.030(a)(2)(A) provides:

> (2) *Discretionary Jurisdiction.* The discretionary jurisdiction of the supreme court may be sought to review
>
> (A) decisions of district courts of appeal that
>
> . . .

> (ii) expressly construe a provision of the state or federal constitution. . . .

Florida Rules of Appellate Procedure, Rule 9.130(a) (footnote omitted).

On August 26, 2009, the Florida Supreme Court dismissed the petition, stating: "It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. *See Jenkins v. State*, 385 So.2d 1356 (Fla. 1980)." App. 1. One interpretation of this is that the Florida Supreme Court declined to exercise the discretionary jurisdiction to review constitutional questions that had been invoked by Petitioner. If this is the case, the 90 days for filing the petition for a writ of certiorari in this Court began to run on this date, and the petition was timely filed.

B. Even if the Petition Was Untimely, the Court May Rule on Its Merits Nonetheless, and Should Do So Under the Circumstances of This Case.

If the State's construction is correct, and the Florida Supreme Court had no jurisdiction to exercise, this Court still has the power to consider the petition for a writ of certiorari as timely filed in this case. This Court has not regarded certiorari time limits in criminal cases as jurisdictional. *Taglianetti v. United States*, 394 U.S. 316, 317 n.1, 22 L. Ed. 2d 302, 89 S. Ct. 1099 (1969). Under the circumstances of this case, Petitioner respectfully requests that this

court ignore any "untimeliness" and consider the petition.

In this case, the reason for any "untimeliness" was to exhaust state remedies by affording the Florida Supreme Court an opportunity to rule in the first instance on the issue presented to this Court in the petition for a writ of certiorari. The petition was timely filed if the 90 days is deemed to begin on the date after the Florida Supreme Court denied review. The extraordinary rule entirely depriving the Florida Supreme Court of any jurisdiction at all to review "per curiam affirmed" decisions of the District Court of Appeal is so inconsistent with the normal practice of discretionary jurisdiction that it should not operate as a trap for the unwary litigant. Petitioner has pursued his claim to great lengths. This Court, in *Padilla*, vindicated his analysis. His diligence in exhausting his claim before the Florida Supreme Court, even if unnecessary, should not in fairness be held to justify denial of certiorari before this Court.

CONCLUSION

Petitioner therefore asks this Court to grant certiorari, reverse, and remand this case to the Florida courts for reconsideration in light of *Padilla*.

Respectfully submitted,

NORTON TOOBY*
ROSE CAHN
LAW OFFICES OF NORTON TOOBY
6333 Telegraph Avenue,
Suite 200
Oakland, CA 94609
(510) 601-1300
(510) 595-6772 (fax)
* *Counsel of Record*